COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Averment provisions in customs legislation

MONDAY, 23 JUNE 2003

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Monday, 23 June 2003

Members: Mrs Bronwyn Bishop *(Chair)*, Mr Murphy *(Deputy Chair)*, Ms Julie Bishop, Mr Cadman, Mr Kerr, Mr Melham (until 11/8/03), and Mr McClelland (from 11/08/03), Ms Panopoulos, Mr Sciacca, Mr Secker and Dr Washer

Members in attendance: Mrs Bronwyn Bishop, Mr Cadman, Mr Kerr, Mr Melham, Mr Murphy, Mr Secker and Dr Washer

Terms of reference for the inquiry:

To inquire into and report on:

The use of averment provisions as contained in the Customs Act 1901. The Committee's inquiry will examine cases that have relied on averment provisions in Australian customs prosecutions.

WITNESSES

DALEY, Mr Simon, Senior Executive Lawyer, Australian Government Solicitor (representing Australian Customs Service) **61**

GRANT, Mrs Marion Estelle, National Director, Border Compliance and Enforcement, Australian Customs Service **61**

HUDSON, Mr Andrew Thomas, Immediate Past Chair, Customs and International Transactions Committee, Business Law Section, Law Council of Australia **79**

LAW, Mr John Victor, Chair, Customs and International Transactions Committee, Business Law Section, Law Council of Australia **79**

RODDA, Mr Ian Richard, Director, Rodda Castle & Co. Pty Ltd **2**

TOMSON, Mr Ken (Private capacity) **2**

TOMSON, Mr Peter (Private capacity) **2**

VORREITER, Mr Stephen, Senior Executive Lawyer, Australian Government Solicitor (representing Australian Customs Service) **61**

WOODWARD, Mr Lionel Barrie, Chief Executive Officer, Australian Customs Service **61**

Committee met at 9.40 a.m.

CHAIR—I declare open the first public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs in its inquiry into averment provisions in the Australian Customs legislation. The committee resolved to conduct this inquiry following the review of the Australian Customs Service annual report 2001-02. Considerable debate surrounds the use of averment provisions. While the provisions are useful for Customs when prosecuting cases, there seems to be a significant potential for defendants to be disadvantaged. Another issue surrounds the burden of proof of these cases, more specifically the conjecture that surrounds the question of whether the evidentiary burden of proof is shifted from the prosecutor to the defendant. Many have argued that this could violate a fundamental principle of our justice system and the prosecution has the onus of providing each and every element of the case.

The committee is very keen to hear from people who have had experience with averments as Commonwealth officers, legal practitioners or defendants. Through this inquiry, the committee will examine the circumstances in which averments have been used and cases that have relied on averment provisions as contained in the Customs Act 1901. One of these cases involves Mr Peter Tomson and his former clothing business, about which we will hear more this morning.

Today the committee will sit for two sessions. We will hear first from Mr Ian Rodda and Mr Peter Tomson, followed by the Australian Customs Service. We will resume this afternoon at four o'clock to take evidence from the Law Council of Australia.

[9.42 a.m.]

RODDA, Mr Ian Richard, Director, Rodda Castle & Co. Pty Ltd

TOMSON, Mr Ken (Private capacity)

TOMSON, Mr Peter (Private capacity)

CHAIR—I now call Mr Ian Rodda, Director of Rodda Castle & Co., and Mr Peter Tomson to give evidence. Do you have any comment to make on the capacity in which you appear?

Mr Rodda—I appear only as the representative of Mr Tomson. Mr Peter Tomson is also present; he is the person on whose behalf the submission has been made. Madam Chair, Mr Tomson's English is not very good.

CHAIR—I am sure we will be patient and help Mr Tomson. The committee has received a submission and supplementary submission from Mr Rodda and authorised them for publication. I would ask you both whether you would like to make an opening statement.

Mr Rodda—Thank you. My remarks will be very brief. Firstly, I would like to thank the committee for giving Mr Tomson the opportunity to have this matter at least placed on the public record. I am mindful of the fact that although the matters that Mr Tomson has complained of and which are dealt with at length in the statement I made to the committee cover matters that go considerably beyond the terms of reference of this inquiry, what I propose doing, subject to any decision that you may make to the contrary, is to simply limit our remarks to the matters specifically raised by the terms of reference—the use and abuse of the averment process itself. If you consider it appropriate to go beyond that, we are entirely in your hands as to how you may wish to proceed.

CHAIR—Mr Tomson, would you like to say anything at the beginning?

Mr P. Tomson—No.

CHAIR—We might begin by setting the dates on which the troubles for you began. Perhaps, Mr Rodda, you could give initial evidence and Mr Tomson can speak or intervene. That might overcome the language problem. Is everybody happy with that?

Mr MELHAM—I understand there are language difficulties. My understanding is that it is all right as long as Mr Rodda restricts himself, because normally we do not allow people to represent people at hearings. It is the witnesses themselves that we want to hear from. I note in his opening statement that he says he is not appearing in his own right but representing Mr Tomson.

CHAIR—I think we might address that question right here and now. The actual submission has been received from Mr Rodda, so we might say that he is appearing in his own right. I think that is a more accurate description. I take your point.

Mr MELHAM—I have no problem with that, but that is not what he said in his opening comments. He said he was here representing Mr Tomson. I note in the submissions and the briefing we have received that he does represent Mr Tomson. That is the basis upon which, as I understand it, he is retained by Mr Tomson. Is that correct, Mr Rodda?

Mr Rodda—If it helps, I might mention—

Mr MELHAM—I just need to clarify it, because there are longstanding precedents in terms of how witnesses appear before committees.

Mr Rodda—Of course. I can understand your concern. Perhaps it is fair to say that what I propose doing is simply identifying the particular issues relating to what we have alleged are the misuses of the averment process in the proceedings against Mr Tomson. I could explain from my own capacity as an observer of those proceedings and as a lawyer myself why I say those averments that were used in the proceedings were used in an improper manner and illustrate why that is the case.

CHAIR—Also, in the circumstances, the secretary of our committee has discussed this with Mr Bernard Wright, who is the Deputy Clerk of the House, and who is happy for us to proceed on this basis.

Mr KERR—I have no objection. But given that Mr Rodda is before us, I would have thought that, provided he is happy, he also indicates to us formally that he is making this submission to us not simply as Mr Tomson's agent but actually as a matter of speaking the truth as he understands it to be, and that he is making his representations to us on that basis.

Mr MELHAM—I have no problems if that is the basis of it.

CHAIR—I think that is what I suggest. I think we are all in agreement. Perhaps you would like to state that you are also giving evidence in your own right.

Mr Rodda—Yes, that is quite so. I am quite happy for the record to show that I am appearing in my own capacity as well.

CHAIR—We might begin by putting this into a date context, when this happened, and just precisely what happened.

Mr Rodda—The events which gave rise to the matters which are before the committee commenced in July 1987. Mr Tomson imported a consignment of goods from a company called the Steady Export Company in Bangkok. I might mention for the assistance of the committee that the actual detail of these transactions is set out in section D of my statement. Perhaps if we looked at that section, it might make all of this a lot easier to follow. There were in fact seven shipments of goods that were seized or detained by Customs. Charges were laid against him and one of his business associates in relation to five of those transactions. No charges were laid in relation to the other two seizures.

Mr CADMAN—It is headed 'Bangkok, July 10'?

Mr Rodda—It is actually on page 34 of my statement, Mr Cadman.

CHAIR—I think to make this intelligible for everyone what would be good is if we had a brief outline of precisely what happened, without going into the detail of the number of shipments. Can you recount the story by way of an outline of what happened in 1987 and then what led up to going to trial. Go through those dates. Then we can look in detail at what was in shipments. If we can have the overview to begin with, I think that would be useful.

Mr Rodda—Being mindful of the fact that I only have an hour and a half.

CHAIR—We are going until two o'clock, so we have more time than that. Do not feel constrained.

Mr Rodda—What we may do then is simply take section D of my statement as read and then just take it up from where that ends, dealing with—

CHAIR—Forget making reference to this in particular, because this has all been published. It is on the Internet, and anyone can have it. Very briefly, give us an overview of precisely what happened without going into the detail at this stage.

Mr Rodda—In July or August—

CHAIR—Our summary says in 1984 Mr Tomson set up a small business importing apparel and footwear. The stock for the business was generally end of season clearance goods and purchases for low prices from community markets and small manufacturers in Thailand, Hong Kong and Taiwan. Would that be true?

Mr P. Tomson—Yes.

CHAIR—In 1987, the ACS started seizing your stock. Was that the first time?

Mr P. Tomson—In 1987, yes.

CHAIR—In 1987, as it arrived in Sydney. This was apparently to determine its customs value as it was thought that Mr Tomson may be undervaluing his goods. Between late 1987 and early 1988, five shipments of goods were seized and two other shipments were detained and never returned. Would that be a good description of where we are at?

Mr Rodda—Correct.

CHAIR—In 1992, Mr Tomson and his business associate were charged with 20 offences under the Customs Act. So in 1987 your goods were seized and in 1992 you were charged. Is that correct?

Mr Rodda—Correct.

CHAIR—And you were charged with four charges each of five shipments of seized goods for smuggling, evading payment of duty, making an entry false in the particular and making a statement untrue in any particular?

Mr Rodda—Correct.

CHAIR—Mr Tomson appeared in court in 1993, where the prosecution relied on averred statements to support the charges against the defendant. Is that true?

Mr Rodda—Correct.

CHAIR—The defence sought to have all charges dismissed, arguing that there was a lack of evidence?

Mr Rodda—Correct.

CHAIR—Mr Rodda, you made claims that the averred facts were the only evidence before the court that suggested any wrongdoing on behalf of the defendant. The magistrate, however, held that a prima facie case had been established in the averments used by the prosecution. Therefore, you had to go to trial. Is that correct?

Mr Rodda—Yes.

CHAIR—With respect to the allegations—which are discussed more fully in the submission you have put to us—about the officers who conducted the investigation into Mr Tomson and his transactions, you say that the officers:

(a), failed to investigate the case in an impartial and objective manner;

(b), ignored evidence that suggested Mr Tomson was innocent;

(c), swore false information to obtain a search warrant; and

(d) generally pursued Mr Tomson for no other reason than to destroy his business and his business interests.

Are they the allegations that you are making?

Mr Rodda—That is correct.

CHAIR—And you say that while the defence showed the averred statements were false and the charges were consequently dismissed—and that is the important thing: they were dismissed—two issues flow from that: do false averments, which you say were put forward, amount to perjury? If so, what consequences follow? You then categorise the evidence put forward by the prosecution into six categories, which basically are: evidence given by the prosecution; documents given to the ACS detailing the actual price paid for goods alleged; documents obtained in Thailand and Hong Kong, including export licences and declarations alleged to contain false information; valuation evidence from an expert who the prosecution claimed had experience in purchasing apparel in Thailand, Hong Kong and Taiwan; and

evidence that the accused dealt personally with the suppliers of goods. Of those you say that the evidence that was tested—

Mr MELHAM—Madam Chair, at this stage can I say that I think it is better coming from the witness rather than you. With the greatest respect, there is a whole series of questions I would like to ask. I think it is inappropriate that you just read out statements and he says 'yes' or 'no'. There are some serious allegations being made by Mr Rodda.

CHAIR—Well, that is what we are going to test.

Mr MELHAM—I accept that. I am not trying to undermine anything that Mr Rodda says. It is just that, with respect to the paraphrasing and quoting by yourself—and Mr Rodda has not had much to say on the record at the moment—I am not comfortable with it. I raise that point.

CHAIR—All right. I am happy to not further proceed in this way. I think we had to set the scene.

Mr MELHAM—I hear what you are saying.

CHAIR—Otherwise we were going to get further detail before we knew what we were dealing with.

Mr MELHAM—I hear what you are saying.

CHAIR—You have what I am reading.

Mr MELHAM—I know. The basis of it is really there in evidence.

CHAIR—It is there in the evidence, but we just needed to set the framework. I have no problem with that. I suppose the questions I want to get to relating to this inquiry are these. You say that the investigation was carried out in a way which was not impartial and objective. I am going to ask you to give details as to why you believe that to be so. You say that false information was sworn to obtain a search warrant. I want to ask specifically about that. We might begin with those two questions. Then others can feed off those questions.

Mr Rodda—I might quickly turn to my statement. I have set out those allegations in detail.

CHAIR—Mr Rodda, I want you to tell the committee what it is you have to say. Leave that alone. Tell the committee what it is so they can ask you questions.

Mr Rodda—Certainly. My first allegation that the investigation was not impartial stems from the fact that the officers proceeded with this investigation on the assumption that a person cannot purchase goods for a price less than the cost of production. That fallacy seemed to cover the entire approach to the investigation.

CHAIR—When you say that was the assertion made, I gather that is relevant to the evidence given by the expert witness on behalf of Customs. Is that right?

Mr Rodda—Correct.

CHAIR—Can you tell us what happened then.

Mr Rodda—Yes. It is our view that the evidence given in relation to cost of manufacture information in Mr Tomson's trial was irrelevant. There is no law that I am aware of that says a person cannot purchase goods for a price less than the cost of manufacture. In fact, the Customs department has a division called the dumping branch, which investigates issues of those kinds. A person can import goods purchased at dumped prices and the question of whether a penalty will or will not apply to those transactions depends entirely on whether there is a dumping notice in force in relation to those goods. If there is no dumping notice in force, then no duty applies to those goods other than the normal customs duty.

CHAIR—So there was no dumping notice?

Mr Rodda—Correct. There was no dumping notice in force in relation to apparel.

CHAIR—Would you like to tell us what you know about the way in which Mr Tomson purchased these goods and why it could be that he purchased them at a price that was less than the cost of manufacture.

Mr Rodda—In relation to Thailand, for example, Mr Tomson's practice was to purchase goods at the Pratunam markets. I will draw an analogy. It is a bit like Paddy's markets or Flemington markets in Sydney. I understand the Victorian markets in Melbourne operate on the same basis. It is simply cheap goods displayed on racks. Any person can come in and just negotiate whatever price is appropriate for those goods. Mr Tomson's experience, I might add, before he came to Australia was within the apparel trade in South-East Asia, so of course he knew this industry and this market very well. The people who were the stall operators at the Pratunam markets in many cases were friends of his. His normal practice when he went overseas on buying trips was to simply buy whatever was left over in the stores when the sellers had sold as much of the stock as they could. Anything that could not be sold was simply kept for people like Mr Tomson to come in and purchase it at whatever price it could be sold for. In fact, on some occasions he even purchased apparel by the kilo rather than as a price per garment.

CHAIR—Is that true, Mr Tomson?

Mr P. Tomson—Yes.

Mr Rodda—I might mention there is even a letter from Customs, which I think is one of the attachments to my statement, where Customs actually discovered that fact in relation to transactions from Taiwan and made a note of it. I will briefly refer to my statement and tell you which annexure it is. It is annexure 8 to my statement. This is a minute dated 27 June 1988 signed by James Delmenico, the senior Australian Customs representative in Tokyo. I draw your attention to paragraph 3:

> You should note that just prior to the Lunar New Year in Taiwan, garments are sold by weight and not quantity and would thus appear to be able to be purchased at very low prices per garment.

If that was a statement that was true in relation to any potential purchaser, then plainly it is also true in relation to people such as Mr Tomson, who actually operated his whole business on that basis.

Mr MELHAM—That is not necessarily the case, is it? You have to look at these things on a case by case basis, don't you?

Mr Rodda—Certainly I agree, Mr Melham. But our case is that Mr Tomson was a person who operated his normal business on that basis.

Mr MELHAM—But that is a matter of fact, isn't it?

Mr Rodda—Of course. Mr Tomson may very well be happy to answer that question.

Mr MELHAM—I am not trying to dispute it. I am trying to dispute the assertion. I am concerned that your submission is littered with assertions and I query the evidence or the inferences that you draw. You have qualifications that enable you to be admitted as a barrister to the Supreme Court of New South Wales. You are aware that in some instances you can only make an inference if that is the only inference you can draw.

Mr Rodda—Certainly.

Mr MELHAM—What I am concerned about is that in your submission you talk about the prosecution being malicious and based on false and fabricated evidence when it is open, of course, to say that the prosecution was misconceived as against malicious. Would you agree with that?

Mr Rodda—Of course. If that document were the only document that I were relying on, then of course I would have had grave hesitation in even making that assertion.

Mr MELHAM—I am interested in terms of false and fabricated evidence as against maybe mistaken evidence. They are the aspects I am interested in. I am concerned that serious allegations are being made against the Customs Service. I want to see the methodical demonstration of your assertions. If you are making the allegations before this committee, I think this committee is entitled to be shown the evidence, not merely assertions.

Mr Rodda—I agree entirely with you. I am only too happy to take you through all of that material. I will just add one caveat. There is a very substantial amount of this material. It is a matter of knowing where to begin. There is just so much.

Mr MELHAM—It is one thing to have a substantial amount of material because there could be a robust prosecution. It could be misconceived. But it is another level to call it malicious, false and fabricated. There are many prosecutions in our courts that proceed on a false basis. That does not make them malicious.

CHAIR—Mr Rodda has made his statement. It is up to him to substantiate it.

Mr MELHAM—I understand that. That is why I want him to substantiate it.

CHAIR—Well, let him get on with it.

Mr Rodda—I will perhaps add something else that will illustrate the point you have just raised, Mr Melham. I was preparing a chronology for this case. I did promise madam chair that I would do that. Unfortunately, we got that bugbear virus on our computer at work, which wrecked everything. I lost three days restoring all our software, so I am some way behind where I wanted to be with this. I will give you an illustration of what I have actually done up to this point. I can illustrate for you what it is that I am saying. I wonder if it is possible to get a copy of what I have here. This illustrates the very point I am making.

CHAIR—Is that your supplementary submission?

Mr Rodda—It is just material that expands what I have actually—

CHAIR—Well, then it is a supplementary submission.

Mr Rodda—It is only a part of one. Sadly, it is not complete.

CHAIR—Do you want to tender it as a supplementary submission? It is a supplementary submission whether it is complete or not.

Mr Rodda—Certainly it is that. Subject to your agreement, I might have some copies of this made for distribution.

CHAIR—Why don't we just receive it into evidence first.

Mr Rodda—Sadly, I have only got the one.

CHAIR—Well, just give us the one.

Mr MELHAM—Why don't you tell us what is in it to begin with.

Mr Rodda—Okay. It is just documents taken from Customs' files that illustrate all of the background to the prosecution of Mr Tomson.

CHAIR—Mr Rodda, you have in your head a thorough understanding of what is going on. What you have to do is impart it to the members of this committee. It is no good telling us, 'Here are some documents.' We do not know what they are.

Mr Rodda—What I would like to be able to do, as I make each assertion, is show you the document that I am relying on—

Mr CADMAN—No, you make the assertions and we will track it down if you are not telling the truth.

Mr Rodda—Okay.

Mr MELHAM—No-one is suggesting that he is not telling the truth. Let us be clear, Mr Cadman. My assertion is that he is overstating the case and that there are other inferences that can be drawn. I am not asserting that anything that Mr Rodda is saying is false.

Mr CADMAN—I said my own words.

Mr MELHAM—I did not want it to be thought that—

Mr CADMAN—I am not putting words in your mouth, Daryl. You say your own words.

CHAIR—Mr Tomson, quite frankly it might be useful, even though this only dates up to 26 October 1987, if you read that out for us.

Mr Rodda—Thank you. Those attachments form—

CHAIR—We will receive all these attachments into evidence. I think if you read that out, we might get a concise view.

Mr Rodda—With the committee's indulgence—

CHAIR—It is not with indulgence. We have asked you to do it. Just read it.

Mr Rodda—There is a general note. Specific details of the background to all of the seven shipments seized or detained are set out in section D of the detailed statement, which was lodged as submission 1 to this inquiry. This chronology only clarifies or expands on matters that are already detailed in that statement. Please note also that despite the claim by the ACS that only four shipments of goods owned by Mr Tomson were seized, the ACS has been well aware from very early on in its investigation of the Tomson case that Mr Tomson was the owner or beneficial owner of all goods seized or detained that were imported by Thongson Imports and Exports, Vamani Pty Ltd and Lanwren Pty Ltd. These organisations jointly brought the proceedings against the ACS in the Federal Court in June 1998 to obtain reasons for the decisions to seize or detain the goods imported by each of these organisations. Mr Tomson and his brother were also the principals of Diamond Ville, a business which imported two consignments of apparel through the port of Brisbane in 1998. I will start off with key dates and events.

CHAIR—Read them all out.

Mr Rodda—On 6 July 1987, Mr Tomson purchased apparel at the Pratunam markets in Bangkok after examining samples collected by his buying agent and left money at the premises of Steady Export Company, which is a registered selling agent for market stall operators.

An invoice on a Steady Export letterhead, as the selling agent of the vendors, was compiled from dockets prepared at the time of sale. At the date of the visit to Steady Export Company by the Australian Customs investigation officers in December 1998, the dockets used to compile those invoices had been discarded. However, a sample of such a document had earlier been provided to the Australian Customs Service in respect of an importation through another export agent, Inanon. I have referred now to attachment A, which is one of the documents before you. The invoice prepared from that document was also supplied to the Australian Customs Service.

That is reproduced there as attachment B. Both of those documents were taken from Customs file N8709209.

On 16 July, the goods arrived at Mascot. They were entered for home consumption. On 17 July, a query memorandum was raised by the Australian Customs Service. The goods were ordered not to be released. On 22 July 1987, the goods were examined by Customs, entry details were confirmed as correct and samples were drawn. In a minute dated 4 August 1987, Customs notes that Mr Tomson and his wife make regular trips to South-East Asia to purchase apparel, that the purchases were made on a face to face basis and that the goods were paid for in cash. That minute is reproduced as attachment C.

Customs plainly knew by 4 August 1987 that Mr Tomson did not purchase his goods by placing orders on overseas manufacturers in the manner normally employed by fashion houses such as Grace Bros and David Jones. In a subsequent annotation to this minute, which is also at attachment C, it is noted that 'there is insufficient proof to mount section 214 action'. Section 214 action is a raid, where books and documents and business records can be seized. The possibility of releasing the goods to Mr Tomson on security is also raised in that minute. On 12 August, despite the minute dated 4 August 1987, attachment C, Customs issued a section 38B notice demanding evidence of payment. A section 38B notice is a notice demanding the production of all commercial records relating to the transaction to show things such as proof of payment.

It is my opinion, based on my experience, that the officer issuing that notice must have known that it would have been impossible for Mr Tomson to comply with that notice. I say that because Customs' own minute dated 4 August 1987 acknowledges that he purchased goods on a cash basis in face to face transactions. It was therefore impossible for him to comply with that demand, and yet that notice was issued in the knowledge that he would not be able to comply with it. It is my view that that notice was issued not because there was any genuine attempt to seek that information but simply to use the issue of the notice as an excuse to continue to hold Mr Tomson's goods.

Mr MELHAM—That is a bit an overstatement, isn't it?

Mr Rodda—With respect, no. I used to be a senior investigator—

Mr MELHAM—I understand you used to be a senior investigator.

Mr Rodda—I know how the system works.

Mr MELHAM—But you are drawing conclusions, I am saying to you, that are not necessarily conclusions that you can draw from those actions.

Mr CADMAN—He can draw them. Whether he is right or not is another matter.

Mr Rodda—I would love to hear an explanation from Customs as to why that section 38B notice was issued when they knew that the commercial documents they were seeking did not exist.

Mr MELHAM—So what are you saying? That everyone who purchases in cash should not get a section 38 notice? Is that what you are asserting?

Mr Rodda—If it is known that documents such as an order confirmation do not exist, there is no point in asking for one. If goods are purchased on a cash—

Mr MELHAM—There is a point in asking for it. If that is the proper way to do business—

Mr Rodda—Not if you know that it does not exist.

CHAIR—Why don't we let him finish reading this through. Then we can go to questions.

Mr Rodda—I will continue. On 17 August, a minute was raised querying the declared customs value on the entry for home consumption for a consignment of goods imported from Taiwan from a company called Winelux Enterprise Company. That is reproduced there as attachment D. The minute notes that the entry is technically false in that when the customs agent prepared and lodged the entry on 6 August 1987, he inadvertently showed the terms of sale as CIF, which means cost insurance freight, instead of FOB, which means free on board. The significance of this error is that the overseas freight costs are required to be deducted from a CIF price for goods to determine their Customs value whereas no deduction is to be made for freight where the terms are FOB. The agent therefore unintentionally entered a customs value lower than that required by the valuation provisions of the Customs Act.

The goods were imported on 8 August, which is the date shown on the entry lodged at Mr Tomson's trial. In fact, it had been altered from 7 August, but I am not going to attach any significance to that. That particular document was exhibit E68 in Mr Tomson's trial. Mr Tomson noticed the error when the customs agent forwarded a copy of the entry to him when it was created on 6 August and asked for a replacement entry to be lodged. The agent sought confirmation of the correct terms of sale from the overseas supplier and lodged a revised version of that entry correcting the error.

Mr KERR—I am trying to follow this. I am looking for attachment D.

Mr Rodda—They are all here.

Mr KERR—That is the new material?

CHAIR—I am having copies made so you can all have a copy.

Mr KERR—I was looking at D in this document. Go on, please. I am sorry.

Mr Rodda—According to paragraph 8.6 on page 2 of attachment D, the revised version of the entry was lodged on 13 August 1987. The correct amount of customs duty payable was then tendered on that day or the following day. It is not clear which day it was. Paragraph 9 of attachment D, though, is particularly interesting because it notes that the error in the entry had been found and corrected by the customs agent in a very short period of time, matters which in fact could very well have taken place without Mr Tomson ever even being aware that the events had occurred. Although it was not the case here, this error might equally have been a simple

clerical error made by an employee of the customs agent. I am aware that mistakes of kind occur frequently in the compilation of customs entries.

Paragraph 9 of that minute wrongly assumes that it was the customs agent who identified and corrected the error. In fact, it was Mr Tomson who brought the error to the agent's attention. Paragraph 9 also deliberates on the moral question of whether the ACS could or should use such an inadvertent error as a basis for claiming that a criminal offence had been committed by Mr Tomson so as to justify the engaging in a wholesale raid in accordance with the provisions of section 214 of the Customs Act to seize all of his business records. The moral issues were then—that is the Customs terminology—apparently brushed aside and an information was sworn to obtain search warrants for a large number of officers to conduct simultaneous raids on Mr Tomson's home and business premises and the offices of his customs agent and his accountant.

Code named Operation 'Honk', the issue of search warrants to nine officers was authorised on 19 August 1987. This is five days after the error had already been corrected. That is illustrated in attachments E and F. The warrants were executed on 20 August 1987, which was six days after the error had already been addressed. That search warrant could only have been obtained through the swearing of an information that Mr Tomson had committed an offence in relation to the goods that were the subject of the warrant. If it was an inadvertent error—

CHAIR—Let us just be perfectly clear about this. Which were the particular goods in the seizure?

Mr Rodda—These particular goods were a shipment of apparel and handbags imported from Winelux Enterprise Company in Taiwan.

CHAIR—This is from Taiwan?

Mr Rodda—Taiwan, yes.

CHAIR—So the first information was laid with respect to goods from Taiwan?

Mr Rodda—To obtain the search warrant.

CHAIR—I am sorry, the search warrant from Taiwan.

Mr Rodda—Yes.

Mr CADMAN—Now the basis of the search warrant was the error or the change that took place to the classification of whether it was free on board or not. Is that right?

Mr Rodda—The search warrant was issued on the basis that Mr Tomson had lodged an entry false in a particular. The false particular was the fact that the term of sale had been stated incorrectly in the entry. Mr Tomson identified that error on 6 or 7 August.

Mr CADMAN—What was the time delay? It was a bit hard to follow from what you said.

Mr Rodda—The original entry was prepared and lodged on 6 August 1987. Mr Tomson brought the error to the attention of his customs broker when he received his copy of it, probably on 7 August. It may have been on the 6th, but I think it was probably the 7th. The broker then wrote to the overseas supplier just to confirm that the terms of sale were FOB and not CIF. I do not know how the agent made this error because when you look at the document you can see that it says 'freight prepaid', so clearly the terms of sale must have been FOB. I do not know how the agent made the error in the first place, but anyway he did. So he showed on the entry that the terms of sale were CIF and therefore deducted the freight costs from the amount shown on the invoice.

CHAIR—So that was the basis of the allegation that it was false in the particular?

Mr Rodda—That was the basis of the allegation, that is correct.

Mr CADMAN—How long did the correction take when the notification came back?

Mr Rodda—That took three days. I believe the correct information was back in the hands of the broker by 10 August. The corrected entry was lodged, according to the Customs records, on 13 August, but they do refer to a covering letter dated 14 August which accompanied. But certainly Customs' own minute records that they received the corrected entry on 13 August 1987. But it was on the 19th that an information was sworn and warrants were sought for the raid on Mr Tomson's home, business premises, customs agent's practice and accountant's office.

CHAIR—So you are saying that the basis of the information, the warrant and the raid were all based on the fact that the documentation showed it was FOB and not CIF and that that was prior to the information laid being corrected? Is that what you are saying?

Mr Rodda—Yes. There had been an error in the entry. It had been corrected at least five days before the information was sworn seeking the search warrant.

CHAIR—And you also say in the documentation it was clear from the body of the information that it could not have been FOB; it had to be CIF?

Mr Rodda—Yes.

CHAIR—So you are saying on the face of the document that you ought to have been able to pick up it was an error and it was not intentionally done. Is that what are you saying?

Mr Rodda—Correct. It was plainly an inadvertent error. The error may have even been made by a junior person in the customs broker's office. But however the error happened, Mr Tomson identified it anyway and brought it to the customs agent's attention so that a correct entry could be then be prepared and lodged. That entry was prepared and lodged and accepted by Customs. So by the time they got around to swearing the information to obtain the search warrant, the problem, whatever it was, had already been fixed anyway and they knew that. That is why paragraph 9 of this minute is so interesting, because it is just a discussion then on the morality of whether they should use this error, despite the fact that they knew it was inadvertent, as the basis for obtaining a search warrant.

CHAIR—So that we can all have the benefit of looking at this minute, I have had copies made. Firstly, I would like to receive the material you have read and the annexures as a supplementary submission.

Mr KERR—So moved.

CHAIR—We will hand them out so everybody has a copy.

Dr WASHER—Could you make this clear for me: basically what you are telling me is that Customs' action was brought about through an inadvertent error of not deducting the cost of transportation from the goods?

Mr Rodda—The cost of freight was deducted in error from the invoice price.

Mr CADMAN—Which reduced the amount of duty payable.

Mr Rodda—It reduced the value as a consequence.

Dr WASHER—So there was no intent by Customs at this stage, for the purposes of search or whatever, to issue warrants that the value of the goods were underdeclared, so to speak?

Mr Rodda—There had been a substantial amount of earlier correspondence where Mr Tomson had been accused of declaring false values. In fact, they use the word 'undervaluation', so basically they were just looking for an excuse to get him, and that is what this attachment D, the minute dated 17 August, actually confirms. They had been looking for a chance to nail him and suddenly here it was. Even though they knew there were serious questions of morality raised by what they were doing, they just put them to one side.

Dr WASHER—I want to clarify this. The essence was beyond just this clerical error, as we say; they did feel that he had undervalued the imported product?

Mr Rodda—Yes.

Dr WASHER—Which is reasonable for Customs to litigate on.

Mr Rodda—It might have been reasonable, but that earlier minute that I referred to, where they set out in detail the fact that they knew he was purchasing goods for cash on a face to face basis—

CHAIR—I want to ask you about this minute. I want to ask you particularly about this paragraph in the minute:

> Information supplied by a competitor's source overseas that this importer could not possibly obtain unit prices as stated on the invoice receipt supplied by Vilaysack. Additionally, INTEL has confirmed that this importer and his wife do make regular trips overseas to Asia. However, INTEL has confirmed that on three previous occasions Vilaysack has been convicted of having undeclared commercial quality goods in his possession on return from these trips.

Would you like to explain that paragraph to me.

Mr Rodda—Yes. In fact there were not three. There was one previous occasion. It was 1984. That is set out in detail in my statement as well. Mr Tomson's former name was Vilaysack, by the way; he was previously known as Paul Vilaysack. In 1984, he came back to Australia with his first purchase of goods to set up his first market stall. He did not understand the question on the customs declaration which asked, 'Are you importing any goods in commercial quantities?' He asked someone what that question meant and was told—this is what he told me—'Are you importing goods for a commercial enterprise?' He thought, 'Well, no. I'm bringing them in for myself,' so he ticked the box that said 'no'. However, when he arrived at the customs barrier, he showed his declaration to the Customs officer at the barrier and asked, 'What does this question mean?' And the response that he received was, 'They'll tell you over there,' and he was directed to the duty baggage channel. When he arrived there, of course, his bags were opened. The significant quantity of apparel was found, so everything was seized and he was charged. On legal advice he pleaded guilty. I would not have advised him to do that, but I was not his lawyer. That was the only occasion on which he was ever convicted.

He was charged again 12 months later with the same offence, but this time the magistrate dismissed the charges. He was quite satisfied that Mr Tomson had not done anything wrong, and the charges were dismissed. Customs then set up an investigation where they checked all of his transactions through parcel post. That was carried out over a period of about 12 months. I think it was during probably—

CHAIR—When you said he was charged again, was it about the same incident?

Mr Rodda—It was him arriving through Sydney airport with apparel in his baggage. It was seized and he was once again charged. This would have been in 1985, some months after the first conviction.

CHAIR—So why did he do that? What quantity of clothing was in the bag?

Mr Rodda—He had six children and they were mainly clothes for the family.

CHAIR—So the magistrate said it was for personal use?

Mr Rodda—Yes. The magistrate was quite happy that it was not a commercial quantity, that he had not done anything wrong, and the charges were dismissed.

CHAIR—It is like Paddington bear. In this minute it goes on to say:

The information obtained on this importer leads to the opinion that the entered values quoted are grossly understated. The fact that all transactions are conveniently paid for as face-to-face cash would also lead to the suspicion regarding the price actually paid.

Matters to be addressed by you are:

(a) if there is sufficient information now available for further investigation by your section re undervaluation and possible fraud,

(b) that if it were not sufficient information thus far obtained, what further information would be required before your section will investigate; or

(c) in light of the response that the importer maintains he does not have nor can he reasonably obtain the information to confirm the Customs value, no means are available for us to take further action to establish if the goods are in truth undervalued.

So the Customs minute is saying, if I am interpreting it correctly, that either Customs will take evidence believing they have sufficient information now available; or if there is not sufficient information, they will find out what they need before they take action; or there is nothing that can be done about it. What was done was that information was sought, there was a warrant and there was a seizure. So that looks like (b).

Mr Rodda—It is clear from that minute that Customs knew that it needed to get more information. I would have thought the easiest way to get it was to send an investigation officer from probably the Tokyo office to Bangkok to find out what exactly happens at the Pratunam markets. That would have been the easiest solution.

CHAIR—Did that happen subsequently?

Mr Rodda—They did eventually do that in December 1989. They should have done it in August 1987, and then maybe we would not be sitting here today.

CHAIR—So what happened after the warrant was presented and the search was done? What happened then?

Mr Rodda—All of his business records were seized and then every subsequent importation he made was detained. A query memorandum was issued for the goods to be checked so that quantities could be verified against the packing list and the invoice and he was asked to produce proof of payment. Knowing full well that he was buying the goods for cash, there was no way that he could produce proof of payment, of course. The demand made was impossible for him to meet.

Mr KERR—It is not quite impossible, is it? The first time he is confronted by this, presumably he could, as I can when I go and do a cash transaction, ask for a receipt or some document that goes with it.

Dr WASHER—Absolutely.

Mr KERR—I am not suggesting that I normally do that, but if I believe that my conduct is the subject of suspicion, I may well choose to avoid difficulties later on by seeking such a receipt.

Mr Rodda—But they had that information. If you look at attachment A of the material that I have just given you, it is a handwritten docket. He would go to the markets and negotiate a price and a quantity. The seller would then write out that docket as evidence of what it was that had been purchased. Mr Tomson would then take that document to a registered export agent like Steady Export Company or any one of a dozen others in Bangkok, give them those dockets and

say, 'These people are going to turn up with these goods shown here.' Mr Tomson would leave the money with the agent and say, 'When they turn up, you give them the money in exchange for the goods.' So they already knew how much he was paying for the goods. They had the dockets. Customs knew that.

CHAIR—The essence seems to be this paragraph here:

> Information supplied by a competitor's sources overseas confirms—

the word 'confirms' is interesting in that they are obviously looking for confirmation—

> that the importer could not possibly obtain unit prices as stated on the invoice supplied.

Which is that invoice?

Mr Rodda—I think that was Mr Prelea that they are referring to, who was an Australian person operating a business in the eastern suburbs. Mr Tomson's view is that Australians turning up in Bangkok do not get the sort of deals that locals get, so he may very well have been in a privileged position. In fact, I do not doubt that he was. However, the prosecution did not proceed on the basis that the prices were not genuine. It proceeded on the basis that you could not possibly purchase goods for less than the cost of manufacture, which was why Mr Prelea was asked to give evidence about the manufacturing cost of the goods. It was really irrelevant and quite misleading.

Mr CADMAN—The competitor was not in fact a competing producer in Taiwan but an Australian who was also an importer. Is that right?

Mr Rodda—That is my understanding. I understand the competitor was actually Mr Prelea.

Mr CADMAN—Who is?

Mr Rodda—Who is the person who turned up to give evidence at Mr Tomson's trial.

Mr CADMAN—He is an importer based in Australia?

Mr Rodda—Yes. It turned out that Mr Prelea, as the magistrate found, was operating at a different sort of commercial level to what Mr Tomson was operating. Mr Prelea was a person who was purchasing goods from factories on a made-to-order basis so that he was actually contracting for goods to be manufactured, although I think his evidence also did say that he occasionally bought goods on clearance sales as well. But I do not think he was asked, 'Do you buy goods from the Pratunam markets?' which is where Mr Tomson bought his goods.

CHAIR—Where did Mr Prelea sell the goods he imported? Who were his purchasers, his customers?

Mr Rodda—I think he operated his own retail outlets.

CHAIR—Do you know what they were called?

Mr Rodda—No, I do not, unfortunately. I do not recall that. In fact, I do not think that question was even asked during the trial.

Mr CADMAN—There is a Prelea Investments Pty Ltd mentioned in this. Whether he did business through that, who would know?

Mr Rodda—No. I do not know the answer to that question.

CHAIR—I note also on this minute there is a handwritten note signed on 6 August 1987. I cannot read the signature. Do you know whose signature that is?

Mr Rodda—I think it may be Johnson, although I am not sure.

CHAIR—He is the senior what?

Mr Rodda—It might be 'senior inspector of evaluations' or maybe it is 'investigation'. I am not sure. I do not know.

CHAIR—It says here:

I have discussed this matter fully with Mr Greig of Commodity Bay 1.

Whilst there are definite suspicions of undervaluation in this matter, there is insufficient proof to mount S.214 actions.

I have discussed the type of evidence needed before S.214 action can be mounted and Mr Greig will refer the matter back to Investigations if this evidence is forthcoming.

I have also suggested S.38B letter be forwarded to importer and possible security amounts be taken vide S.38B(4) and Reg 25 (Forms 45A & 45AA) if delivery of goods is required.

I am also happy to provide a Band 5 Inspector (GREG GRAUSAM) to accompany your officers on visits to this importer.

Mr Rodda—That is a very important note because it shows that Customs recognised that if it wanted to protect the revenue, all it had to do was assess a value at whatever level they thought was appropriate and serve a demand on Mr Tomson for additional duty. It is called a post note of demand for duties short paid. Mr Tomson then had the option of paying that sum to obtain delivery of his goods and simply leave the matter there or, alternatively, he could pay the sum demanded under protest and then apply to the Administrative Appeals Tribunal for a review of the decision to demand that extra duty.

In those circumstance, Mr Tomson would have borne the onus of proving to the tribunal that the price shown on the invoice was correct. If the tribunal accepted that it was correct, he would be entitled to get his money back. If it was not satisfied that what he said was correct, then the situation would be left and Customs would have the right to retain the duty. But by not giving Mr Tomson the opportunity to ever obtain delivery of his goods by the issue of a post note, he was effectively denied the right given to him by section 167 of the Customs Act to dispute the customs assessment of value.

CHAIR—Why do you think that course of action was not pursued?

Mr Rodda—I do not know. You would have to ask Customs that.

Mr KERR—What was the advantage, from Customs' point of view, in this course?

Mr Rodda—That way, they got to keep his goods.

Mr KERR—What about the money actually paid by way of duty? Was that returned?

Mr Rodda—No.

Mr KERR—So the goods were forfeited?

Mr Rodda—The goods were forfeited and he lost his duty anyway.

Mr KERR—And what is the recovery mechanism for a person in this situation? There must be some legal mechanism to challenge this.

Mr Rodda—Yes. If goods are seized under section 208 of the Customs Act, the owner has 28 days in which to claim the goods. That happened in each case. As each consignment of goods was seized, Mr Tomson claimed them. What Customs is then required to do is to serve notice on him to bring recovery proceedings for those goods or, alternatively, if they have released the goods to him on security, he is then required to bring recovery proceedings for the recovery of this security. After the notice claiming the goods was sent to Customs, they did not respond for something like two and a half years. They then served notice on him two and a half years after they seized his goods and said, 'You can have your goods back now if you pay us $230,000.'

CHAIR—So was that in fact a post note under section 167?

Mr Rodda—No. That was an offer to return the goods on security.

Mr KERR—Let me follow this through. They can seize the goods and retain payment. Presumably, they do that in cases where they suspect fraud rather than serving on a matter less significant. In each instance this occurred, you say that Mr Tomson wrote requesting release of his goods, or whatever the technical language was—

Mr Rodda—Claimed them, yes.

Mr KERR—Claimed them. Customs was obliged by law to do what? What are the time limits?

Mr Rodda—There are no time limits specified in the act, which is a serious weakness in the act.

Mr KERR—So the only course that would be appropriately open to you would be either under the AAT or in the original jurisdiction to seek an order that a duty be performed or mandamus in the High Court to compel that?

Mr Rodda—What we in fact did was apply under the Administrative Decisions (Judicial Review) Act for a statement of reasons for the decision to seize the goods. Customs put on its evidence in affidavit form in those proceedings and sought immunity from disclosure. In putting that affidavit forward—this was in June 1988—it asked that the contents of the affidavit not be disclosed to anyone other than counsel who appeared for Mr Tomson. He was not even permitted to disclose the contents of the affidavit to the instructing solicitor. The barrister who appeared for Mr Tomson, Michael Cashion, who is now a senior counsel, has told me in a letter just a couple of days ago that he did not even read the affidavit given to him.

CHAIR—Who did not read the affidavit?

Mr Rodda—Michael Cashion, the senior counsel, who appeared for Mr Tomson.

Mr MELHAM—Mr Rodda, it is not unusual in cases for counsel only to have access to certain documents, is it?

Mr Rodda—Well, I do not know. In this case it did seem most unusual that counsel was not permitted to seek instructions from his instructing solicitor as to what he might say in response.

Mr KERR—I want to follow the trail through to get the story, I suppose, the yarn. Tell us in your own words what happened. You say Customs presumably treated Mr Tomson on the basis that—obviously in the documentation—they think he is shonky. They think he is cheating.

Mr Rodda—Yes, correct.

Mr KERR—They take a minor technical point and they seize his documents as a result, I suppose regarding that as an entry point for this offence. So they chase this up. Each time he seeks to import goods, they then seize those goods. He takes the legal remedy available to him by seeking them to release those goods to him. They do not comply within a reasonable time. His legal response is to seek a statement of reasons why the seizures were authorised. You have now told us as part of the yarn that they respond to this by filing an affidavit and seeking from the court protection of its release other than to his barrister?

Mr Rodda—Correct.

Mr KERR—Can you take us through the yarn. Tell us where it ends. Give us the story and then we can chisel our way into this and see whether there is something that flows from this about averments.

Mr Rodda—Certainly. What then happened is that when Customs sought immunity from disclosure of the affidavit that was tendered in the proceedings in the Federal Court, the judge's instructions to Mr Cashion were that he was not to disclose its contents to anyone, including his instructing solicitor. So Mr Cashion has told me that he returned the affidavit unread to counsel for Customs and left the court. He told the judge that he if wished to get in touch with him, he

would be in his chambers. He walked out of the court and told Mr Tomson, 'We're wasting our time. Withdraw from the proceedings now.'

Mr KERR—That sounds to be particularly stupid counsel and unhelpful to Mr Tomson's interests. Then what happened?

Mr Rodda—Mr Tomson withdrew from the proceedings. Since he was to know nothing of the case against him, there did not seem to be any point in proceeding. Customs was clearly going to disclose no reasons for the decision.

Mr KERR—If no reasons were to be disclosed, why didn't he take any of the other alternative remedies, for example, mandamus, to compel a decision which under law Customs presumably is obliged to undertake—that is, to deal with a request for a release of goods which have been seized?

Mr Rodda—I think it is the case now that with mandamus and the other prerogative writs the Federal Court has jurisdiction to deal with those matters. So he was already in the Federal Court anyway.

Mr KERR—But why didn't he proceed with an action for mandamus?

Mr Rodda—He had already put a fair bit of money into applying for a statement of reasons. There did not seem to be any point in pursuing the matter if plainly we were going to be stonewalled by Customs at every turn.

Mr KERR—I cannot second-guess counsel at the time. It is often a question not of legal rights but whether you are prepared to spend money.

CHAIR—If you have any.

Mr KERR—That is the truth. We all confront that as citizens from time to time. You may well have established legal rights that you do not pursue for perfectly sound commercial reasons. But if you are asserting that there is a large conspiracy, a criminal conspiracy, I suppose, or a gross abuse of office by Customs and the obvious courses of law have not been pursued, then I suppose some of us are a little sceptical, because you would say, 'Well, why wasn't this tested at the time by taking proceedings which were open to compel Customs to act according to law rather than withdrawing from proceedings when Customs sought to claim confidentiality for some particular document?'

Mr Rodda—The particular document in respect of which immunity from disclosure was sought was the entire Customs case. So we were effectively to be told nothing. Since that was the practical effect of the decision, there was clearly no point in pursuing those proceedings.

Mr CADMAN—I do not understand the legal implications, but what comes next?

Mr KERR—Good question.

Mr Rodda—Mr Tomson would have continued to throw good money after bad by continuing.

Mr CADMAN—They pulled out and said, 'That's that.' Tell us about the next episode in *Blue Heelers*.

Mr Rodda—Mr Tomson was then called Vilaysack. He changed his name to Peter Tomson. He went to Brisbane and started up a company called Diamond Ville with his brother. Diamond Ville made one importation of goods, which was released by the Queensland Customs. A second shipment turned up, but by this stage Sydney Customs had discovered that Mr Vilaysack had changed his name to Tomson. A request was made to the chief inspector of investigation in Queensland to detain that shipment.

Mr MELHAM—He paid for that shipment in cash?

Mr Rodda—No. He actually bought that shipment on 30 day terms of credit. Because he was running out of money by this stage, he had an agreement with the export agent who delivered the goods to Australia to get them in and sell them. He would then be able to pay him from the proceeds of the sale. So he actually had 30 day terms of credit. What happened was those goods were detained. Mr Tomson phoned me. The chief inspector of investigation in Queensland was a friend I had worked with in the customs department in Canberra some years earlier. I asked him if this problem had happened and he said yes, it had. I said, 'Well, look, you know you have power to detain goods,' and he said, 'Yes, I do know that.' I said, 'Look, you had better make a decision. Either seize the goods or release them.' He said, 'All right. Let me look into it.' He rang me back a couple of days later and said, 'I'm going to release the goods.' And Mr Tomson obtained delivery of those goods. But then a couple of days later, Mr Taylor rang me again and said he had had a phone conversation with the investigation officer in Sydney, who was in charge of the Tomson investigations. The officer in Sydney was very unhappy that the goods had been released. My friend said to me, 'You'd better tell your client not to import any more goods through Queensland.'

Mr KERR—Then what happened?

Mr Rodda—Mr Tomson ceased importing. It was the last shipment of goods he ever imported into Australia. That was in mid-1988.

Mr MELHAM—In 1988?

Mr Rodda—In 1988, yes.

Mr KERR—Then you say at some subsequent point there was an offer from Customs to release all the previously seized goods in exchange for a commercial arrangement. How was that put?

Mr Rodda—It was an offer to release the goods on security. I think the amount was about $240,000. That offer was made in April 1990, I think. Don't quote me on that. I do have the documents.

Mr KERR—That is all right. Tell me if I am completely wrong, but I assume given the tenor of what you are saying and the style in which are you saying Customs operated, you would have said that $240,000 was more than the proper duty owing?

Mr Rodda—Considerably more. This was the entire market value, not just the duty that was owing.

Mr KERR—And that that offer was only a sham? That is really what you are putting to us.

Mr Rodda—The goods by then were worthless, yes. He was broke anyway. He did not have the money and the goods were worthless by that stage anyway. So it was a pointless offer.

CHAIR—I want to go back to the trail of the minute and the subsequent 214 action. Before I do that, I want to ask you this: what is the explanation of the gap between seizure in 1987, the last shipment in 1988, the offer to release on security in 1990 and no action taken against Mr Tomson until 1992?

Mr Rodda—A summons was received in 1992, that is correct.

CHAIR—Why is that so?

Mr Rodda—I do not know. You will have to ask Customs that.

CHAIR—Because he had ceased trading in 1988. Is that right?

Mr Rodda—That is correct. There was one visit to Bangkok, as I recall, by two Customs officers in February 1989, but I do not think they came away with terribly much or, if they did, there is nothing on the Customs files to indicate what it was that they obtained on that visit.

CHAIR—Do you know who they were?

Mr Rodda—Yes. Their names were Locker and Grausam.

CHAIR—Locker?

Mr Rodda—Yes.

CHAIR—That is a familiar name. Mr Locker was involved in Midford.

Mr Rodda—Yes, correct.

CHAIR—This would have been contemporaneous with Midford, I guess, would it not?

Mr Rodda—Yes, that is correct.

Mr KERR—Can I finish this exploration here. I can understand at the moment the case you are making through the inferences you put to us that you suggest we should draw. Whether we do, of course, is a different matter. The inference we should draw is that an innocent man who is doing cash transactions, essentially cleaning up discounted, end of season stock for under its production value, becomes suspected of fraudulent conduct and gets treated with a rash of fairly

draconian enforcement actions on the basis of a false suspicion. That is essentially the case that is being put to us?

Mr Rodda—Yes.

Mr KERR—Now even if we accept that as an accurate assessment of what happened, an overenthusiastic and perhaps too quickly aroused set of suspicions, I am troubled with the linkage between the terms of reference of our inquiry, which is about averments. Nothing thus far turns on an averment because the powers used, if any, were powers that did not require averments or go to averments.

Mr Rodda—Quite so. We have not got that far yet.

Mr KERR—If you can excuse me for perhaps now asking where the story takes us.

Mr CADMAN—Before you get to that point, I seek a point of clarification, if I may. We have spent some time looking at the classification of the goods for the way in which they are paid for, be it FOB or CIF. On the basis of that declaration, according to this minute dated 19 August signed by Mr Parragio, the case seems to be constructed in this way. We have detected this CIF entry, which was really an FOB, which is an understatement. Therefore, we suspect all previous consignments were undervalued but, if they were not undervalued the way in which they were entered, CIF or FOB was incorrect and, therefore, there is an abstraction in dollar terms of possible underpayment of somewhere between $230,000 and $150,000, based on the low price. Has the way in which they have entered it got anything to do with it? Is it really the fact that it was picked up because of that error?

Mr Rodda—I think I understand where you are going with that. I think that the Winelux transaction was simply a one-off error, but it was a convenient error from the Customs point of view.

Mr CADMAN—So that allowed you to do the abstraction of possible undervaluation and go back over previous consignments?

Mr Rodda—No. They had long suspected that the prices shown on the invoices were too low.

Mr CADMAN—They had a 75 per cent undervaluation in here.

Mr Rodda—In their view it was too low. In coming to that conclusion, of course, they had to ignore something—

CHAIR—I will interpose there and follow up on Alan's question. Mr Johnson says in his handwritten note:

I have discussed the type of evidence needed before S.214 action can be mounted.

Prior to that he says:

Whilst there are definite suspicions of undervaluation in this matter, there is insufficient proof to mount S.124 action.

Mr CADMAN—That was only a week before.

CHAIR—That is a week before. By finding the FOB-CIF error, that gave them sufficient backing to go on a 214 and seize.

Mr Rodda—What a remarkable stroke of good fortune.

CHAIR—In other words, a reading of this could be that they built up an opinion, just as they did in Midford, actually; they decided in Midford that Midford were causing a fraud to the revenue and then went out to prove it but failed. The trigger is that they believe this man was importing and undervaluing, admit in their own minute that there is not sufficient evidence to get a section 214 search warrant to go in there and seize and then they find this invoice which shows, firstly, on the body of the document that it clearly was an FOB contract by in fact saying it was CIF and the amount was deducted. But before any action is taken to make a 214 search and seizure, the error on the document on which they are relying is corrected five days before they then go ahead and get it. So it is being used, you could say, as a contrivance to get access for search and seizure.

Mr Rodda—As I said, a remarkable stroke of good fortune. In fact, even the invoice itself should not have allowed the mistake to arise, because my recollection is that while the Winelux invoice did not show the terms of sale at all, from memory, it did say freight prepaid. For people engaged in international commerce, you know that if freight is prepaid, it is not going to be part of the FOB value of the goods in the first place.

Mr CADMAN—That is right.

Mr Rodda—So it was obviously a simple clerical error, which was corrected very quickly. I might draw your attention to another thing. This is quite an important document. During the trial, we tendered a study by the Customs Cooperation Council on the sale of surplus stock. It is annexure 6 of my statement. Every Customs officer who has anything to do with valuation of goods knows about this study.

Mr CADMAN—It is sale of surplus stock?

Mr Rodda—Sale of surplus stock. This is from Customs' own training material. What it says in essence is that at different times during the year things like fashion goods will be sold for less than the cost of production. That was Mr Tomson's case. They cannot possibly come before this committee and say they did not know that. That is just nonsense. Of course they knew it. It is annexure 6.

Mr CADMAN—It says:

An exporter sells goods to a foreign customer at a price lower than that which such goods are currently sold by his competitors to the foreign market concerned.

CHAIR—I see. This is a test.

Mr Rodda—This is from Customs' own training material on the valuation of goods.

CHAIR—In other words, it is a known practice.

Mr Rodda—Of course.

CHAIR—That is why they have dumping provisions.

Mr Rodda—It is a well-known practice. Any Customs officer who has anything to do with customs valuation knows about that study.

CHAIR—I notice that we have Mr Locker, who was the regional manager of industry assistance, and Mr Parragio, who was a director, who are both people involved in Midford, again in 1987. I suppose what we are looking at is a culture that existed at that time too. What date in 1992 did the summons get issued?

Mr CADMAN—That is jumping too far ahead for me. Could you cover the bit between 1988 and 1992. What happened during that period? You were broke?

Dr WASHER—No, not until 1990.

Mr CADMAN—Well, he could not afford to bring in more stuff.

Mr Rodda—He was bankrupt in 1990 and broke long before that.

CHAIR—Was he made bankrupt?

Mr Rodda—He was made bankrupt in 1999.

CHAIR—In 1999?

Mr Rodda—In 1999.

Mr CADMAN—That is a credit in 1990?

Mr Rodda—He lost his house in 1997. He had money invested overseas until about 1990. That money came back into Australia. That is what he lived on for a couple of years until he eventually ran out of money. Then he just kept increasing the mortgage on his home and he lived off the increase in the equity in his home. But eventually once he could not repay his mortgage, he lost his house and then finally was declared bankrupt in 1999.

Mr SECKER—So did the bank actually bankrupt him—the mortgagee?

Mr Rodda—Yes.

CHAIR—What date was the summons served in 1992?

Mr Rodda—It was on 16 July 1992.

CHAIR—What happened between 1990 when the offer to release the goods on security for $240,000 was made and 1992, when the summons was served? Was there any connection between Customs and Mr Tomson? Did anything happen?

Mr Rodda—Not that I know of.

CHAIR—There was no contact at all, Mr Tomson?

Mr P. Tomson—No.

Mr CADMAN—So it is just sitting out there.

CHAIR—The other thing that happened in 1992 is that Midford fought.

Mr Rodda—Yes.

Mr CADMAN—So what happened in 1992?

Mr Rodda—The summonses were served and then he was then prosecuted. The trial commenced in July 1993.

Mr CADMAN—Why would that happen?

Mr Rodda—Once again, you will need to ask Customs that.

Mr CADMAN—They offered his goods back, which seems to indicate that there was nothing untoward that happened. Was he summonsed because he had not paid the money to get them back?

Mr Rodda—I do not know. I suspect that Customs may have been under a bit of pressure from some of the foreign customs administrations that they had involved in this investigation, who had written to ask whatever happened to this fellow that they were pursuing. In the meantime, I had also raised the matter with my local member, Mr Ruddock, who wrote to the then customs minister, Mr Jones, who said, 'Well, we do not have to prosecute people simply because we seize their goods.' But that letter may have actually—

Mr SECKER—You can seize them for the hell of it and not take it on to its logical consequence.

Mr Rodda—Yes, although it would be nice if we had habeas corpus in relation to property. We would never get abuses like this arising.

Dr WASHER—Coming back to the financial distress that is being illustrated to me, where Mr Tomson could not afford to pursue the law perhaps to the full end because of a lack of finances and resources, I think in about 1987 he had a turnover of about $1 million a year. He had multiple overseas investments in this state. The amount of goods, as stated by Mr Tomson, being held was just under $13,000. That is hardly a bankruptcy thing, $13,000 on the table, when you are turning over $1 million and have multiple investments overseas. You wouldn't think that

would be an achilles heel. I know there is a flow-on and knock-on effect, but it was not the only thing he had in the tin. He had multiple other investments as well.

Mr Rodda—I think that $13,000 has a touch of hyperbole in it. It was well known to Customs that Mr Tomson had a beneficial interest in goods imported by Vamani Pty Ltd, Lanwren Pty Ltd and Diamond Ville as well. So the $13,000 I think related only to the goods imported by Thongson Imports and Exports, which were seized. They were not his only losses, of course.

CHAIR—We are up to 1992. Summonses have been served and the trial commences in 1993. Would you like to tell us precisely what happened when you turned up at court.

Mr Rodda—Yes.

Mr SECKER—What court was it?

Mr Rodda—It was the local court.

CHAIR—A magistrates court?

Mr Rodda—It was a magistrates court proceeding, yes. The crown prosecutor read out his opening address in which he said that Mr Tomson was being charged in relation to five different shipments of goods. When I say five, I am including the Lanwren shipment in that as well, in which he had a beneficial interest. Four charges were laid in respect of each shipment. There was a charge of smuggling, a charge of evasion of duty, a charge of making an entry false in the particular and a charge of tendering a document containing a statement which was untrue in a particular. So there were 20 charges in total, being five shipments. No charges were laid in relation to the other two shipments of goods which had been detained but not seized.

CHAIR—But they still kept the goods?

Mr Rodda—But they still kept them anyway.

Mr SECKER—Do you know what has happened to those goods?

Mr Rodda—No.

CHAIR—They are probably rags by now.

Mr Rodda—As an aside, a lot of the goods were actually on racks in the foyer of the court. A couple of the young women employed there were leafing through them before they went in and said, 'Who'd buy this stuff?'

CHAIR—They would be all out of date by then, five years old.

Mr Rodda—They were very well and truly out of date.

CHAIR—What happened?

Mr Rodda—The third prosecutor read out his opening address. I have actually included the relevant sections of that in one of the many statements I have sent. I am trying to remember which one it was now. He said in essence that the evidence fell into five categories. There were documents which were produced to Customs. There was the fact that Mr Tomson went overseas and purchased the goods for cash.

CHAIR—There were five documents.

Mr Rodda—Five categories of evidence.

CHAIR—Five categories of evidence?

Mr Rodda—Yes. There were in fact six because the averments were also a category, but he did not refer to them in his opening address.

CHAIR—He did not refer to the averments? He only referred to five affidavits?

Mr Rodda—No, what he called five categories of evidence. If I can find the note, I have quoted the actual section from the opening address. It is all set out in a letter dated 8 May to you.

CHAIR—You tell us about it.

Mr Rodda—I am quoting now from my letter to you. I will read from page 1:

> The prosecution's summary of its evidence commences in the final paragraph at the foot of page 3 of the transcript.

A copy of that is available.

CHAIR—Just read it.

Mr Rodda—It concludes in the middle of page 5:

> The five categories of evidence were as follows: documents presented to the ACS by the defendants Tomson and Kongkeo Keomalavong; documents obtained overseas by ACS investigation officers; expert evidence relating to the cost of manufacture of the goods which were the subject of the charges; the fact that the defendants travelled overseas to purchase the goods personally; and the fact that the amount of money sent out of Australia by Peter Tomson over a period of about two years exceeded the value of the goods imported during the same period. The averments sworn by the ACS to initiate the proceedings were also with evidence, as were noted later in the magistrate's comments.

Now before summarising the defence position in relation to the evidence, it is important to note from the transcript that the prosecution attempted right from the outset to mislead the court as to the true nature of the proceedings. I refer in particular to this statement:

> In each case the price value disclosed on those invoices which were produced to Australian Customs was said to be done on a FOB basis, on a free on board basis, and in each case it is the prosecution's case that the figures disclosed were false. They were substantially less than the true value of the goods.

CHAIR—That figure is $1,500, even allowing for the correction?

Mr Rodda—I think that was the case.

CHAIR—I think that is in the minute from Mr Johnson. Let us go to what is the substantial amount of money. The memo says:

> The goods were entered on the basis of CIF invoice from which the prepaid air freight was deducted to arrive at the FOB value shown on the entry. Subsequently, a copy of the original invoice was produced showing the same particulars but with the term of sale FOB Taiwan. As a consequence, the FOB value of the entry had been understated by $1,547.47, thereby creating a false particular.

That is the amount referred to as substantial, the $1,500?

Mr Rodda—Yes. That is a Winelux transaction, correct. I will go on with the opening address. The expressions 'price value' and 'true value' are unknown in customs law and they are quite meaningless expressions.

CHAIR—So who is using those terms?

Mr Rodda—The prosecutor in his opening address to the court.

CHAIR—And you are saying that those terms have no basis anywhere?

Mr Rodda—They are meaningless. I believe the prosecution used these expressions, however, in an attempt to mislead the court into accepting that an owner of goods has a legal obligation to declare in a customs entry that the customs value, which is a legal concept, of the goods is not necessarily the price actually paid or payable but is some other amount that will be acceptable to the Australian Customs Service. That proposition, in my experience, is utter nonsense. The obligation imposed on the owner is to declare the amount paid or payable for the goods, which is precisely what Peter Tomson did in every case. It is the ACS which bears the legal duty to determine the Customs value. Without more such as evidence of deliberate fraud, an owner of goods does not and cannot commit an offence if he correctly declares in the customs entry the amount that was actually paid or payable for the goods. They are the five categories of evidence. They are my observations on what the prosecutor said in the opening address.

Mr KERR—Excuse me for being slightly at right angles to what you are saying. It may be that the prosecutor misconceived the law or it may be that he was simply using language that was, I suppose, shorthand. Price value presumably means what the person actually paid. He may be making an assertion that this is fraudulent, that in fact the person acquired the goods for a price different from what he asserted. He might be contrasting that with what the market value for the goods might be, or something of that kind, to leave the court to draw an inference that this was inherently improbable that somebody would actually have paid X when the real market price was Y. It does not seem to me so weird that somebody might use language in such a way. If I assert that I bought a diamond ring for $5 and it is worth $500,000, I suppose it would be open for somebody to say that that difference might lead one to be wary of an assertion that this was an accurate representation of the true price paid.

Mr Rodda—I might be perfectly happy to agree with you on that proposition but for one thing, and that is the expressions 'value' and 'price' are both used in the valuation provisions of the Customs Act and they have plainly different meanings. In fact, I can remember in valuation training days we used to talk about the $10 Rolls Royce. If someone bought a Rolls Royce for $10 and it was a genuine transaction, would Customs be compelled to accept that as a genuine price? The answer is no, you would not. There are provisions in the act that allow for arbitrary or fictitious prices to be rejected, but this is a procedure in the act that deals with that as an issue. If Customs has any reason to believe that the price is not genuine, then it is required to pursue the course that is set out in those valuation provisions of the act.

CHAIR—Is that section 167?

Mr Rodda—No, that is the protest provision. I think it is actually division 2 of part 8 of the Customs Act, the part of the act that deals with Customs valuation. There are many provisions in there. They give effect to Australia's obligations under the—

CHAIR—Let us get it straight. If you get that sort of example and Customs is able to say, 'This is a fictitious transaction. The real value of this is X, therefore the duty is Y. You can either pay the duty and get the goods or you can forfeit the goods.' Is that what is provided?

Mr Rodda—Yes, that is correct. What normally happens is in a situation like that, if you want to, you can pay the sum demanded under protest and then you apply to the Administrative Appeals Tribunal for a review of that decision.

Mr KERR—I am not trying to express any wisdom here. I do not understand it at all. It is a very complex system. Let us take the $10 Rolls Royce. There are two possible scenarios. A scenario is that the person actually paid $10 for the Rolls Royce. The customs entry is therefore accurate, but Customs challenges it on a different basis—not that the entry was inappropriate but on the basis of the suspicion it has raised.

Mr Rodda—It would be rejected on the basis that it is an arbitrary value.

Mr KERR—The second basis is that you get the $10 Rolls Royce and you believe that more than $10 was actually paid. Presumably, that was the instance that Mr Tomson confronted. In that instance, they have gone to a prosecutorial role because they say that the inference they draw is that he was lying.

Mr Rodda—In that case, you would need evidence of fraud.

Mr KERR—In this instance, they infer certain facts or draw inferences, ones which you of course reject but which on the materials might be open. They certainly do establish an evidentiary base on this document that they suspected Mr Tomson of being shonky. As I said, it may well be that he is an innocent and he is the subject of therefore overzealous conduct. But all I am saying is that from the opening of the prosecutor, as I understood it, you were categorising it as a way to mislead the court. I was simply saying that maybe it is no more than simply saying, 'Looking at this as a whole, you will draw the conclusion that Mr Tomson was acting in a fraudulent way when he made the declarations he did.'

Mr Rodda—With respect, anyone involved in the determination of goods for customs value clearly understands the distinction between money price paid or, in Customs jargon, MPP, which is used quite frequently in query memoranda raised, and the customs value itself, which is a legal concept.

Mr KERR—Even counsel briefed? Here I am, an experienced lawyer, with not a clue about what you are talking about to some extent. This is a very arcane area. It is possible.

CHAIR—Usually counsel briefs people familiar with the area.

Mr KERR—I do not know. I can accept that Customs itself acted with a degree of, I suppose, concentrated determination to 'catch' Mr Tomson once they formed a view as to what they presumably saw him as being, fairly or unfairly. But it is a long reach to think that counsel then tried to mislead the court by the way in which he opened the case. Courts read the law. How would you mislead the court by such an opening?

Mr Rodda—I will explain why.

CHAIR—Do we know whether this counsel was someone who was regularly used by Customs, or was he someone who had just been brought in, somebody who was jammed and he copped the brief?

Mr Rodda—I do not know.

CHAIR—Leaving aside that point, the five categories of evidence, as I understand them, are, one, the evidence relating to the basis for the 214 seizure. That is the Taiwanese—

Mr Rodda—No, I am sorry. The categories of evidence read out by the prosecutor at the opening address to the court were the documents presented to Customs—

CHAIR—In respect of which?

Mr Rodda—All five of the shipments.

CHAIR—Which of the five was the Taiwanese one with the FOB-FOI and what were the other four? Where were they from?

Mr Rodda—The first shipment was the Steady Export shipment from Taiwan.

CHAIR—One was Taiwan.

Mr Rodda—Yes.

CHAIR—That was the subject of the FOB-CIF confusion?

Mr Rodda—Yes, that is correct. The second one—

CHAIR—Was where?

Dr WASHER—Hong Kong. It goes to Hong Kong.

Mr Rodda—The second shipment is the one you are referring to, the Winelux Enterprise shipment from Taiwan.

CHAIR—The second one was also from Taiwan?

Mr Rodda—The first one was from Thailand. That is the Steady Export shipment. The second shipment was the Winelux shipment from Taiwan. The third shipment was the Gold Vincent and Company shipment from Hong Kong. The fourth shipment was the New Calcutta Store shipment from Thailand.

CHAIR—When we say New Calcutta Store, is that where he bought from?

Mr Rodda—That is the name of the export agent who prepared the documentation.

CHAIR—Export agents. So in every case there is an export agent?

Mr Rodda—Yes. The goods were always bought from street stalls or markets.

CHAIR—What is the fifth one?

Mr Rodda—The fifth actual seizure was the Cameron Trading Company shipment. Those goods were imported by Lanwren Pty Ltd.

CHAIR—And who was that?

Mr Rodda—That was a friend of Mr Tomson. Mr Tomson actually provided the finance for that company and was the beneficial owner of the goods.

CHAIR—Who was the beneficial owner of the goods?

Mr Rodda—Mr Tomson.

CHAIR—So why were they imported in Mr Lanwren's name?

Mr Rodda—Because Customs had seized all of his previous shipments, so he just started up some new companies.

CHAIR—So you were trying to stop what you believed was an illegal seizure.

Mr Rodda—There were two other shipments that were detained.

CHAIR—But they are not dealt with in this.

Mr Rodda—No, they are not. They are referred to, though.

CHAIR—Documentary evidence was produced in respect of all those five things?

Mr Rodda—Yes.

CHAIR—Where did the averments come in?

Mr Rodda—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 against the defendants at the close of the crown case, where the defence sought dismissal.

CHAIR—I am aware of all that. Let us go to the averments.

Mr KERR—They are shown as one of your attachments, aren't they? Where are they?

Mr Rodda—They are set out in attachment 12 of my statement.

Mr KERR—What is the one at K? There are two sets.

CHAIR—That is a summons.

Mr KERR—So there is a summons?

Mr Rodda—The summonses are the information used to initiate the proceedings.

Mr KERR—So they were the ones before the magistrate, were they?

Mr Rodda—Yes.

Mr KERR—You say the ones at 12 are the ones that were before the New South Wales Supreme Court or something of that kind?

Mr Rodda—I think they are the same ones. I will just check. Yes, they are.

CHAIR—The same document, I think.

Mr Rodda—The same document.

Mr KERR—They actually have different form. They contain different paragraphs and bits and pieces. But nothing really turns on it.

Mr Rodda—I thought they were the same document.

CHAIR—They look the same.

Mr KERR—Well, some are amended.

Mr Rodda—Sorry, some were amended, yes. That is quite so. I have only used the Steady Export Company and Cameron Trading ones as illustrations for what I wanted to do today. The amended ones we need not concern ourselves with. But the same issue arises in relation to them as well.

CHAIR—Why were they amended?

Mr Rodda—Customs amended them just to change some of the facts. It was not really explained to us what the reasons for the changes were. They were comparatively minor. As far as we were concerned, they did not affect the validity of the documents themselves.

CHAIR—So how many summonses were laid? How many informations were laid and how many summonses were served?

Mr Rodda—Twenty.

Mr KERR—And these are just a selection? Is that what you are saying?

CHAIR—No, I think at the back there are 20.

Mr Rodda—There are 20 at the back.

Mr SECKER—This is five by four?

Mr Rodda—Yes, five by four.

CHAIR—The proceedings are commenced by the use of the averments.

Mr Rodda—Yes.

CHAIR—You turn up at the court. Customs' counsel makes an opening statement. What do you do at the end of that statement?

Mr Rodda—We did not do anything. The prosecutor said he thought Mr Tomson would be unrepresented so had not actually served any documents on Mr Tomson.

CHAIR—Why would you not serve documents on somebody who would be unrepresented?

Mr Rodda—Well, I was hoping that the Crown might have at least let him know what the nature of the case was against him before they trialled it.

CHAIR—Let us go through that. Whether or not someone is represented surely does not determine whether or not you get served documents.

Mr Rodda—I would hope that in the normal course of events anyone charged would be entitled to know what the case is against them, yes.

CHAIR—And Mr Tomson never received any documents?

Mr Rodda—Nothing. We were handed—

CHAIR—Is that normal, in your understanding?

Mr Rodda—Not in my experience, although I confess I do not work in the criminal law jurisdiction. So we were handed—

CHAIR—So the prosecuting counsel said, 'I did not expect Mr Tomson to be represented. Therefore, we have not given him any documents.' Did he actually say that?

Mr Rodda—No, he did not say that. He just said, 'We did not expect Mr Tomson to be represented,' which apparently was an explanation for the fact that nothing had been given to Mr Tomson.

CHAIR—So he said, 'We did not expect Mr Tomson to be represented.' What happened then?

Mr Rodda—He handed over a whole bunch of folders containing the material that was to go into evidence. We sought a short adjournment to look through it to see what the case was.

CHAIR—He said, 'We did not expect Mr Tomson to be represented. Here are a whole pile of documents'?

Mr Rodda—Yes.

CHAIR—So you sought an adjournment?

Mr Rodda—Yes.

CHAIR—How long was the adjournment?

Mr Rodda—A couple of hours. Most of it we had already seen anyway, so it was not of any particular concern to us.

CHAIR—What happened then?

Mr Rodda—The Crown asked if all of the material could be taken into evidence. We had no objection to that.

CHAIR—Why did you do that?

Mr Rodda—I believe that Mr Tomson had been honest all the way along the line with me and I had no reason to think that there would be anything in any of that material that would be adverse to him anyway. We also understood from the prosecutor's opening statement that Customs would be leading evidence from officers who had gone overseas to obtain documents and that they would be leading evidence about those documents.

CHAIR—Let me ask you this question: if you had known that Customs would not call any evidence, would you have agreed to the documents going into evidence?

Mr Rodda—No. We certainly would have wanted every document to be identified. We did accept the prosecutor's statement that Customs would be calling witnesses who would say what the documents were and where they obtained them.

CHAIR—So they absolutely said at the beginning that they would call evidence about the documents that were being tendered?

Mr Rodda—Yes. I believe I have actually quoted that section of the transcript in the letter dated 8 May. If you allow me a brief moment, I will see if I can find that section for you. It is in there.

Mr KERR—This is in your long submission to us?

Mr Rodda—No. I think it is in a submission dated 8 May to Madam Chair.

Mr KERR—Do I have it? If we have a document that you are referring to, it would assist to have copies made and entered into evidence.

CHAIR—We had better receive it now. While we are about it, that document that I asked you to read earlier, Mr Rodda, could somebody move that we receive it as part of a supplementary submission.

Mr KERR—Sure.

CHAIR—Thank you. This document that you have here, we have that in our possession. We will receive it as a further supplementary submission. Are you happy to receive it? Could somebody move it?

Mr KERR—Yes. I cannot understand anything unless I have it. I probably will not understand it even when I have it. That is my problem.

Mr Rodda—I can only apologise for the volume of material. I can assure you we went through many boxes of photocopying paper in getting to this point.

CHAIR—So we are at the stage where the prosecuting counsel has said that they are going to call evidence relating to the documents that you agreed that the court could accept into evidence?

Mr Rodda—Yes.

CHAIR—If you had thought for a minute that they would not call evidence, then you would not have agreed to the documents going into evidence?

Mr Rodda—Correct.

CHAIR—So the documents have gone into evidence. What happens next?

Mr Rodda—Evidence was called in relation to everything that was non-contentious, namely the customs entry, the invoice, the packing list, the bill of lading, the customs entry itself. It was the Crown's case that all of those documents contained information that was false. It was the defence case that everything in those documents was true and correct. So the only documents that had the potential to show that anything Mr Tomson said was false were the documents obtained overseas. A very curious thing happened. The witness list shows that two officers were intended to be called to give evidence in relation to the documents obtained overseas, namely Mr Grausam and Mr Delmenico. When Mr Grausam took the stand, he was not taken to any of those documents that were obtained overseas. So he gave no evidence in relation to them.

CHAIR—What happened in cross-examination?

Mr Rodda—We had a bit of a dilemma. Mr Parnell, who appeared for Mr Tomson, and I had a bit of a chat about it and thought, 'Well, they haven't led any evidence about these documents. Do we put these documents to the Crown witness, effectively to make the Crown case for it to pull it apart, or do we just let the Crown make its own case?' Anyway, we realised that Mr Delmenico was also scheduled to give evidence, so we assumed that even though Mr Grausam had not been asked to give evidence about the documents, Mr Delmenico would be. So we thought—

CHAIR—Did you ask that question?

Mr Rodda—No, we did not. We agreed then that we would not raise the issue. Since the Crown had not bothered doing so, we thought, 'There's no point in us doing it.'

CHAIR—Why did you think Mr Delmenico would be called?

Mr Rodda—Because he was shown on the witness list as a person who would be called to give evidence about those documents.

CHAIR—He was on the witness list?

Mr Rodda—Yes. I have that with me. It is in one of these boxes on the floor. What then happened was that as soon as Mr Grausam had finished his evidence, the Crown closed its case. Mr Delmenico was not called.

Mr CADMAN—I do not know about court proceedings, but wouldn't you jump up and down and say, 'Listen, where's this other bloke you said you were going to bring?' Aren't you allowed to do that?

Mr KERR—You might be cutting your hands if you think the prosecution has closed its case without the key piece of evidence.

Mr Rodda—We sat there in shock for a while, to be quite honest.

Dr WASHER—Because he was the investigator sent overseas twice.

Mr CADMAN—And he came back and he apparently did not have anything against him.

Mr Rodda—The position really was that we took the view that it is not the defence's job to make the Crown's case for it to then pull it to pieces.

CHAIR—Correct.

Mr Rodda—So we just did not. I will give you an example. This is just an example from the first case, the Steady Export one. This is the material handed to us by the prosecution at the commencement of the case. It is headed 'Brief Head', and then there is a list of witnesses. You can see that Mr Delmenico and Mr Grausam are referred to.

CHAIR—We will receive that as an exhibit.

Mr CADMAN—So moved.

Mr KERR—Excuse me for not understanding this, because I do not. What did Mr Grausam give evidence about, if not the documents?

Mr Rodda—Not terribly much. As I recall, most of his evidence related to the fact that a change had been made to a query memorandum. He was questioned about who had actually made the change and what the significance was. It was a change in relation to the print version of events that had been lodged. Mr Parnell seemed to think that was a fairly significant matter to pursue. I did not think terribly much turned on it. In the end, I do not think anything emerged from that evidence anyway.

Mr KERR—I do not know what happened. Are these gentlemen people who are asserted to have gone to Thailand to look at the factual bedrock of what was happening?

Mr Rodda—Yes.

Mr KERR—You say when this matter came to trial, they gave no evidence about what they did when they were overseas?

Mr Rodda—Yes. Mr Grausam had sworn a detailed statement, but the crown decided not to put that into evidence.

CHAIR—Had you seen that statement prior to Mr Grausam taking the stand?

Mr Rodda—No. It was served on us on the day he took the stand.

Mr KERR—You had that, did you?

Mr Rodda—It was handed to us the day he took the stand.

CHAIR—How was it handed to you?

Mr Rodda—It was just handed across the bar tables: 'Here. You might be interested in this.'

CHAIR—When? At what point was it handed to you?

Mr Rodda—I think when Mr Grausam actually took the stand to give his evidence.

Mr SECKER—This was after the adjournment?

Mr Rodda—Yes, after the first adjournment when we were given the documents, yes. We were some days into the trial by this stage, I should add. Mr Grausam did not take the stand on the first day.

CHAIR—If you had had that statement in advance, had read it, would there have been different questions you would have asked Mr Grausam?

Mr Rodda—Definitely.

CHAIR—Would you like to tell me what they might have been.

Mr Rodda—Yes. Mr Grausam's statement in fact confirms the accuracy of what Mr Tomson had told me about the way that he did business—that he went to Bangkok, that he went to markets, that he purchased goods by bargaining with the operators of the stalls, and that he wrote out a docket of the kind that I showed you when we first started this morning. Those dockets were then taken to a registered export company so that the export company could then type up the information in the dockets on its letterhead. I should add that this is normal practice, by the way. This is the way export agents actually do business in South-East Asia. The small companies just do not have the resources to do export documentation, so it is all done by registered export companies. Then Mr Tomson left with the export company the amount of funds necessary to pay for the goods so that when the sellers then turned up with the goods, they were then paid for. The agent would deduct a commission from that sum as his fee for arranging the transaction and so forth. So the agent did keep some of the money for his own purposes. Then the goods would then be delivered.

Mr KERR—There are very few free lunches in this business.

Mr Rodda—Very true. So then the goods delivered over to Trans Air Cargo, which was the freight forwarding company that Mr Tomson used. The goods would then be packed. Packing was prepared and a bill of lading. An air bill would be prepared and then the goods would be shipped to Australia. At the same time, all of the export documentation for the Thai customs service was also prepared and sent to the Thai customs or the Royal Bank of Thailand for exchange.

Mr KERR—So this is the statement Mr Grausam made given to you on the day but not retailed as evidence?

Mr Rodda—Yes. He did not have all of that in his statement. He had substantial parts of it in his statement. What I am telling you is what Mr Tomson told me.

Mr KERR—What Mrs Bishop asked was what was in Mr Grausam's statement given to you. Which components of that were in Mr Grausam's statement?

Mr Rodda—In Mr Grausam's statement there were things such as how Mr Tomson would come in. They called him a walk-in exporter. He would bring in the dockets showing the amount he had paid. The goods would be delivered. The export invoice would be typed up on the letterhead of an export agent. The export agent would be paid a commission as its fee for the use of its letterhead. In fact, all the documents—

Mr KERR—If I can be crude about it, what is omitted there is any verification of the fact of purchase, but there was nothing in what Mr Grausam said that was inconsistent with what Mr Tomson was saying was the course of conduct?

Mr Rodda—Exactly. What Mr Grausam's statement actually said was a confirmation of the accuracy of everything Mr Tomson said.

Mr KERR—Parts of what Mr Tomson had said. What is not in what you have said that matches is any confirmation that he had gone to a particular market seller and confirmed that that was the price of a particular transaction on a particular day.

Mr Rodda—There were questions in Mr Grausam's statement about the prices paid and whether those prices were too low. This was in the presence of two officers from the Thai customs service, by the way. Some of the questions Mr Grausam asked were along the lines of, 'Do you think these prices were too low?' The people being interviewed said, 'No. If they were too low, the Thai customs service would have rejected them.' These statements are actually made in the presence of officers of the Thai customs service.

Mr KERR—I understand that. All of that is perfectly—

Mr CADMAN—That is in the statement?

Mr Rodda—It is in Grausam's statement.

Mr KERR—All that is perfectly consistent with what Mr Tomson is saying.

CHAIR—The point he is trying to get at, Duncan, was that the statement was not given to the then defendant prior to his calling it. It was given at the time he takes the stand. They do not call any evidence about documentation. As I understand it, a strong part of their case they were relying on was the two documents. One was provided to the Thai bank dealing with foreign exchange and the other one was the straight export document—

Mr Rodda—The invoice delivered to Australian Customs.

CHAIR—The import document given for Australian purposes. Customs found a gap between two differing amounts, which would be normal, because one is in US dollars—

Mr Rodda—Yes, that is correct.

CHAIR—One is in US dollars. Customs added the two together and said it was the real price. Is that what happened?

Mr Rodda—Correct. That is what Customs said, yes.

CHAIR—Whereas in this statement of Grausam it talks about those forms and which ones have to go where. That is in the presence of two Customs officers from Thai customs, who are validating what those people are saying about what is Thai practice. But despite that all being in the statement, they did not lead evidence on that. You did not know it was in their statement because you had not read it.

Mr Rodda—No.

CHAIR—So you did not lead it either.

Mr Rodda—Correct.

CHAIR—The Crown then closed its case, so there was no opportunity to do it after that. So then the courts says, 'These facts have been averred. That is prima facie evidence. Ergo, it is a trial,' or rather, 'You have to call your defence.'

Mr Rodda—The Crown case was that the document given to Australian Customs, which had an amount in Australian dollars, was one payment for the goods. There was another document headed 'Invoice' showing an amount in US dollars. This is in relation to the Steady Export transaction. It showed an amount in US dollars for the same goods. There was no dispute it was the same goods. The case was—this was in the prosecutor's opening statement—that if you add the two sums together you get the amount that was really paid for the goods. But that was a deliberate misrepresentation of the truth. The fact is that the information in both documents was correct. What Mr Tomson did was pay for the goods in baht, of course, and convert it at the rate of exchange applying to baht. He got a value in Australian goods. That was the information put in the document sent to Australia. But because the agents had charged a commission for their services, they deducted from the total amount payable to the sellers the amount of their commission.

Under Thai law you are not permitted to include in the value of a foreign exchange earning a sum or a fee that is charged for a service performed in Thailand. You have to deduct it. So the amount shown in the documents given to Thai customs was the lower amount in baht. You are also required under Thai law to declare all export values in US dollars. So that document in reality was a document created for internal exchange control purposes in Thailand for the Bank of Thailand.

Mr KERR—I accept all that. But if that is a simple statement of how things operate, no-one is greatly prejudiced by you explaining that as part of your case. What puzzles me, I must say in this, and no more than puzzles me, is that if this prosecution was conducted by the DPP, presumably counsel has reviewed all the material.

CHAIR—No. It was not the DPP. It was Customs itself.

Mr Rodda—The DPP had apparently declined to proceed with it. So the matter then went to the Australian Government Solicitor and Customs just briefed the AGS

Mr KERR—I do not know. That is an interesting thing for us to follow up. Was there any independent scrutiny of the substance of the case? At the end of the day, as I understand it, okay, you have got to this point. There is a big hole in what the prosecution is seeking to prove. The question, I suppose, is that we are going to look at the fairness or unfairness of averments. In this instance, you have a straightforward explanation of the hole, and presumably your client in the end walked free as a result of that. No great injustice was done. The injustice, such as it is, is that the matter was batted on with up to that point. If this is the case, there was no independent mind directed before the prosecution was taken as to the weight or otherwise of the case.

CHAIR—I think you said that the DPP did look at it and declined to take the case. Would you like to talk about that.

Mr Rodda—There is a lot of correspondence on the files we obtained under the discovery order involving the DPP office and then suddenly there is no more. I assume they were taken out because of legal professional privilege. They were not disclosed to us.

CHAIR—Is there a document there that says no case to proceed?

Mr Rodda—No, there is nothing like that.

Mr KERR—I am trying to get this to the focus of our inquiry. Do you understand what I am looking at here? The reason we have a DPP or somebody outside the police investigation process for criminal law is that, with no disrespect to the independence and the integrity of the police, when you commence an investigation, often in the working through of it you lose your critical capacity for independence of judgment. You form a view that somebody probably did something and then you or the facts become funnelled towards that objective. This is the reason why in criminal law we step back and say, 'The file now gets transferred to an independent prosecutor, somebody who can step outside that, look at it again afresh without all the kind of work invested and sentiment that goes into preparing.' There is no malice or propriety in this at all.

What seems to be the case here is that, if you are correct, this file was worked up and driven through the court system. However, if you had applied an independent and external mind to it, would you have concluded that there was, at least in inference, evidence consistent with innocence equally open to that which was suggesting guilt? I put it no higher than that. You would not have batted on.

Mr Rodda—Correct.

Mr KERR—So if there was any prejudice to Mr Tomson—and plainly he went through a prejudicial experience—what I am saying is that there is not much in the averment because the same process would have happened in averment or otherwise, perhaps. But the real problem is that you did not have an independent mind stepping outside this and saying, 'Well, on this material you do not get to a point where a court could conclude beyond reasonable doubt that Mr Tomson was guilty of a crime.'

Mr Rodda—In the end, when you look at all of the evidence that was actually put during the trial, when you consider the probity value of each of the five categories identified by the prosecution in its opening address and then look at the averments, you realise that the averments in the end were the only evidence that suggested any wrongdoing on Mr Tomson's part.

Mr KERR—Which is why I come back to the basic point. The real deficiency in this process, averments or otherwise, was, from what I understand, that nobody came to this with a fresh and independent mind at any stage through the proceedings.

Mr CADMAN—You are saying that the capacity to make an averment may not be the critical factor?

Mr KERR—To me, it may not be. There are two issues. One is set that aside, because averments may in the end be inappropriate for us to continue. But even if we were thinking that they were legitimate and appropriate and they have a place, nonetheless the account you have given suggests that something else went wrong. The material necessary for Customs to have made the averments and to have relied on them and to have had confidence in this was simply not there. In fact, they actually had material that was on a reasonable reading consistent with what Mr Tomson said, not to every detail, but substantially so.

CHAIR—But the problem with that line of reasoning is that the 20 summonses were issued on the basis of the averments. If you did not have the power under 255 to aver, you could not have commenced the proceedings.

Mr KERR—I understand. I am not suggesting that this means we place no weight on that issue. I mean—

CHAIR—I accept the point you make.

Mr KERR—Take, for example, a search warrant. You may argue that search warrants are an appropriate part of law enforcement but still criticise the process where the police go to a magistrate and seek and obtain one when they do not have the basis for it. All I am saying is that we may still say that averments are reasonable, but not in this case when they did not have any material to justify it.

CHAIR—There is another thing I think that is important on that point. It may be useful if you provide us with the correspondence between Customs and the DPP that you obtained through discovery orders.

Mr Rodda—Yes. I do not actually have that with me.

CHAIR—Yes, but if you could supply it. If you could let the committee have that, I think it would be through discovery that would be most useful to us.

Mr Rodda—Most definitely.

CHAIR—We have now got to the stage that you are then called to bring your defence. You then presumably call witnesses.

Mr Rodda—Yes, correct.

CHAIR—Who do you call?

Mr Rodda—We called Yonna Saeong, whose married name was Chonwaranat. She is referred in the transcript as Chonwaranat. She was Mr Tomson's buying agent. She explained to the court that the prices shown on the invoices that were given to the Australian Customs were correct, that she did buy goods herself for those prices, not just for him but for numerous customers. We also showed her the documents that had been prepared for Thai customs and for the Bank of Thailand. She was asked to explain to the court what they were and what the significance of the invoice shown in US dollars was. She explained that to the court. We also called Noel Balzary, who was a former senior investigation officer in the customs department. In fact, he was the director of the dumping branch, so a very senior, experienced investigation officer. He was shown the documents obtained overseas and asked to express his opinion to the court on their probity value. He just said that he did not think they had any value at all. I am summarising that, but in essence that is what he said.

CHAIR—So that was the defence's case?

Mr Rodda—That was the defence's case, yes. And Mr Tomson was also called.

CHAIR—At the conclusion of that evidence being given, the magistrate dismissed the case.

Mr Rodda—Yes.

CHAIR—With costs?

Mr Rodda—No. He misdirected himself as to what the Justices Act actually required him to do. He made an order under the Justices Act, which he believed compelled him to make no order as to costs. We thought there was a provision in the Customs Act that in fact overruled that. So we then took that matter on appeal to the Supreme Court, and the Supreme Court said that the Customs Act provision overrode the provision in the Justices Act.

CHAIR—And therefore costs should have been awarded?

Mr Rodda—Yes.

CHAIR—So the Supreme Court would then have directed the case back to the magistrate to make the award for costs?

Mr Rodda—Yes.

CHAIR—What happened then?

Mr Rodda—In the meantime, he had a heart attack and retired from the bench.

CHAIR—So what year are we now up to?

Mr Rodda—We are now up to October 1998 when Customs made an ex gratia offer of some of Mr Tomson's costs.

CHAIR—They made an ex gratia payment of how much money?

Mr Rodda—Mr Tomson received, I think, $80,000, but I understand the amount may have been higher than that because costs had been awarded against him in the Federal Court and he had not paid those costs, so that was just deducted from the award.

CHAIR—But he received $80,000 net?

Mr Rodda—I think he finished up with about $80,000, yes.

CHAIR—When did you receive the $80,000?

Mr Rodda—That would have been October 1998.

CHAIR—So this thing began in 1987, they continue to seize things in 1988, in 1990 they made an offer to give you your goods back for $240,000. Nothing then occurred until 1992. Then summonses were issued. A court case began in 1993. It was dismissed. A magistrate made an error as to costs. You go to the Supreme Court and get a ruling that he ought to have awarded costs. He has a heart attack. You finally get an ex gratia from Customs and in 1998, 11 years later, you receive a payment of $80,000?

Mr Rodda—A net payment.

CHAIR—In the meantime you have been made bankrupt, lost your house, lost your business, lost your reputation.

Mr SECKER—Was he not bankrupt in 1999?

Mr Rodda—In 1999, he was formally declared bankrupt, but he was in impecunious circumstances long before that.

Mr SECKER—The $80,000 in 1998 did not help stop his bankruptcy?

Mr Rodda—Part of that $80,000 was used to fund my trip to Thailand to interview some of the same people that Mr Grausam had interviewed, not that that was very much. It was $5,000. The rest was used to pay his other legal expenses.

Mr SECKER—So it was not enough to stave off his bankruptcy?

Mr Rodda—No.

CHAIR—If we go back to Mr Grausam's evidence, if I were to take the evidence given by your expert witness who was the purchaser for Mr Tomson and others in Thailand as to the

method of purchase, if I were to compare her evidence with statements obtained by Mr Grausam in Thailand, would they read the same?

Mr Rodda—Not entirely, but you would see the similarities. You can see that they are actually relating the same narrative, just from a different perspective.

CHAIR—Now the document given to you at the court was the original document as sworn by Mr Grausam?

Mr Rodda—It was a photocopy of what I was told was the original, yes.

CHAIR—It was a photostat. It was not the original?

Mr Rodda—No, it was not the original, no

CHAIR—Where is the original?

Mr Rodda—I do not know. I assume Customs has that.

CHAIR—Then we had the extraordinary break into your office?

Mr Rodda—Yes.

CHAIR—When was that?

Mr Rodda—On 27 April this year.

CHAIR—Can you tell me what happened.

Mr Rodda—Someone came through the door with a sledgehammer or some other large blunt object, stole a flat screen monitor for a computer and a digital camera. They were the only obvious things missing. When I was preparing documents for this case, I discovered a few days later that part of the document that is Mr Grausam's statement had disappeared. In fact, the pages that disappeared were the pages relating to his interview with Trans Air Cargo.

CHAIR—What is the significance of that?

Mr Rodda—It is my view that a very substantial amount of what is in that particular statement corroborates what Mr Tomson told me about his business dealings in Bangkok. Beyond that, I cannot say anything.

Mr KERR—This has been presumably reported to the police?

Mr Rodda—Yes. On both occasions.

CHAIR—Would you like to go through some of the evidence that was given by Trans Air Cargo just to make the point you say?

Mr Rodda—Yes, certainly.

Mr SECKER—Have you been able to receive that in the meantime from other sources?

Mr Rodda—Yes. Fortunately, I had already copied them and distributed them to several people, so I was able to get a copy back very quickly.

CHAIR—Mr Tomson, how much money do you think these actions, the seizures and the prosecution, did you lose? Mr Rodda, I am asking Mr Tomson how much money he thought he might have lost. Would Mr Tomson's son be able to interpret for him?

Mr Rodda—Yes.

CHAIR—How much money does Mr Tomson think he lost due to the action of the seizures and the prosecution?

Mr K. Tomson—It is very hard to put a figure on it.

CHAIR—You lost your house.

Mr Rodda—His turnover was about $1 million a year.

CHAIR—His turnover was $1 million a year.

Mr Rodda—In 1987.

Mr K. Tomson—Business wise, he says it is very hard to say, basically.

CHAIR—Mr Tomson, I think we will swear you as a witness. That might make life easier. The turnover was $1 million a year.

Mr Rodda—It had grown fairly substantially each year too. He started off on about $30,000 a year in 1984. By 1987, it had grown to the $300,000 mark.

CHAIR—You might make an estimate of what you think you might have lost at some other point of time. Perhaps you could advise the committee of it. In the meantime, have you found this evidence?

Mr Rodda—I seek your indulgence for perhaps 10 minutes. I would like to go through this statement and just identify each section. It will take me 10 minutes.

CHAIR—We might take a short break. We want to hear from Customs.

Mr MURPHY—I have some questions. Mr Rodda, you make a number of serious allegations about the officers in Customs who conducted the investigation into Mr Tomson and his transactions. It is clear that the Customs officers handling this, according to what you say, were dishonest or monumentally incompetent. I would like you to focus on four areas of your

exhaustive submissions in this matter. I will just take you through each of the four and get you for the benefit of the committee and the Customs officers, who can hear the testimony you are giving here today, to relay the serious concerns you have about this.

The first one is you say the officers who conducted the investigation into Mr Tomson's transactions failed to investigate the case in an impartial and objective manner. I would like you to support that with oral testimony to this committee this afternoon. I want you to deal with that one first. Second, you claim that the officers who conducted the investigation in Customs ignored evidence that suggested Mr Tomson was innocent. I am looking to know what evidence you claim they ignored particularly. I will take you down that path. The third element of your testimony to this committee is that you say the officers of Customs who conducted the investigation into Mr Tomson swore false information to obtain a search warrant. The other element of your evidence to this committee said that the officers of Customs who conducted the investigation generally pursued Mr Tomson for no other reason than to destroy his business and his business interests.

Each and every one of those elements are serious. Because this goes to the heart of the position he now finds himself in with the original investigation, I need you as succinctly and to the best of your recollection to go through each of those areas for the benefit of this committee and the Customs officers who are listening. I would like you to start with your claim that they failed to investigate the case in an impartial and objective manner. Just stick to that and then we will move on to the other three.

Mr Rodda—I do actually have a very substantial amount of material, including documents obtained under a discovery order during Mr Tomson's trial. I would be relying on a very substantial amount of that material, which unfortunately I did not bring with me. I only brought with me what I thought we would actually need for this morning's purposes. Two sections of that I can deal with today. One will be from the statement of the Trans Air Cargo document that I am going to go through in the adjournment. The swearing of the false information I have already alluded to in relation to the Winelux transaction. There was another one as well in relation to Cameron Trading, as I recall.

Mr MURPHY—Would you make that available to this committee?

Mr Rodda—Certainly, most definitely. In relation to the other material that I obtained under the discovery order, I would have to do that on another occasion and bring it all with me.

Mr KERR—Can I raise a point here. I well understand the case you are making. But I am a bit troubled by us taking the specifics of these matters as if we are going to make findings about whether the inferences that you draw as to the honesty or otherwise of Customs in an investigation or whatever testimony they might provide by way of response goes to the term of reference as to the utility of averments. I quite understand why, having reached the point we have, Mr Murphy wants this material. It would seem to flow logically that if you are making these assertions, you establish the case and the materials and what have you. Then I presume in the interests of fairness Customs officers will come forward and say, 'No, this isn't the case. We had this material,' or what have you, or 'We do not have material, we cannot disclose or we botched it,' which is the alternative to a conspiracy. After long experience in politics, often I do find that a botch is a more likely scenario. I was in a situation where I was justice minister for

some years. I have been aware that sometimes investigations and investigators of very good standing and high repute sometimes get it wrong.

It is a matter for the chair how we control this proceeding, but it does seem to me that we aren't within this inquiry really able to make findings as to the truth or otherwise of these matters. I am rather worried that your own client has gone through a fair amount of distress about this. It may well be that a more appropriate course for us is to consider these allegations rather than to seek to determine the truth or otherwise of them and suggest a mechanism to deal with the possibility that the allegations carry the inferences you assert. I am worried that we are going to get into a—

Mr MURPHY—If it helps the chair, I do not propose to exhaustively, because I did preface my remarks by asking Mr Rodda to succinctly go through the facts of each of those elements. They lay at the foundation of the situation that Mr Tomson now finds himself in. The allegations are serious. I think there should be an opportunity for you to succinctly, honestly state what you believe, because there is a plethora of evidence here. Equally, procedural fairness and natural justice dictates that the Customs officers should have the opportunity to respond. Seriously, what you are saying, if I accept everything you have said in relation to the conduct of the investigators in Customs, natural justice principles have been slaughtered. Now that might be right and it might not be right. I do not know. I think it would be useful for me and the committee to have a succinct summary by yourself of each of those elements. I have to go to the chamber at about 1.30 p.m. I think it would be helpful, because we are all having difficulty. Let Mr Rodda summarise each of the elements that I am asking him about.

Mr Rodda—I will take a point Mr Kerr made. I do have a very substantial amount of material dealing with all aspects of this case, but I came along today only sort of armed to deal with the specifics of inquiry, which is the averment procedure itself. So what I have with me only relates to the allegations about averment.

CHAIR—As best you can, just deal with the questions.

Mr MURPHY—He stated that he believes the averments were perjured. Now that is a very, very serious matter.

Mr Rodda—Yes.

Mr MURPHY—Well, the first one is to fail to investigate the case in an impartial and objective manner. If you could do that in about five minutes.

Mr Rodda—I actually made some notes on this; I think they are being copied at the moment.

Mr CADMAN—Is that this chronological thing?

Mr Rodda—Yes, thank you. There is a note on the customs file, the minute dated 4 August 1987. Customs' own file notes that Mr Tomson and his wife make regular trips to South-East Asia to purchase apparel. The purchases are made on a face to face basis and they pay cash. There is nothing unlawful about that, yet everything that followed in relation to the investigation assumed that Mr Tomson would only be a legitimate businessman conducting a legitimate

business if he were placing orders on foreign suppliers from Australia and ordering from catalogues and receiving back order confirmations and documents of that kind in the way the major retail stores do. They never address themselves to the fact that this was also an honest businessman who just did things in a different way. He did things in the manner, for example, that is referred to in that study from the Customs Cooperation Council documents that was tendered in the proceedings in the local court. Now Customs officers cannot say they do not know what is in their own training material. That is absurd. The investigating officer should have had those things in the back of his mind when he started this investigation. A lot of those things were just—

Mr KERR—Just being devil's advocate, I accept this. But the point you assert is that they failed to investigate it in an impartial manner. They draw an inference has been so disadvantageous to your client from the outset. It appears at this moment, subject to what Customs says, to be well founded. Your case is essentially he was buying up surplus that was under the normal retail price. See it from an outsider's point of view, as I first hear it. You have a man who they see as having once at least walked through customs with stock. Okay, there was a misunderstanding, but still it is something that shone a light on him. Secondly, they have a fellow who is going overseas repeatedly buying stuff for cash, which is not the usual way in which Australians in that retail sector do their business. He is using a different method. He is bringing it in at prices that are far less than they believe to be the market. To say that your starting proposition is that you should regard this without suspicion seems to me to be naïve. In the end, I do not challenge what you are saying—that there has been a terrible set of consequences that flow from that assumption. If I were a copper, I would have a suspicion..

Mr CADMAN—But you would not be making these sort of averments that said that—

Mr KERR—No.

Mr CADMAN—You would not be making averments based on what you have heard, would you?

CHAIR—Not only that, Mr Grausam in his own statement, talking in Thailand says that—

Mr MURPHY—I think we would all accept—

CHAIR—He says there are lots of little importers into Australia, exporters from Thailand, who are honest. They do not have to be big. There is no problem with them being a little exporter so long as they are honest and they do not try and break our laws. He then says:

> We have found that in Thailand the goods are very cheap compared to Australia, but these people are just greedy. They just want to, whereas clothing might be $5 or $6 Australian, they declare it for $1 and they still make good money, good profit. By being honest, they could make … A lot of small importers are honest, but there are a few greedy importers prepared to break the law, and this is what we are trying to stamp out.

In other words, there is in this questioning an attitude that says, 'We're out to nail these people because we think they're greedy whereas there are a whole lot of others we are aware of, but we picked him.'

Mr Rodda—If you want evidence of a lack of objectivity, there it is right there.

Mr MURPHY—Duncan, I accept what you say absolutely, because if I were investigating this matter, I myself would have wanted to look at it more closely and scrutinise the conduct of Mr Tomson and his business. What I am ultimately leading to is that there comes a point where obviously from what you say there is a manifest injustice to your client. Ultimately, I will want to know at that point what Customs were doing or failing to do rather than just sending this bloke to the wall and destroying his life.

Mr Rodda—I am sorry to interrupt. There was a simpler and far more expedient course available to them. All they had to do in relation to any of these shipments that they thought had values declared too low was to assess a value, issue a post for duty short paid, let him pay it under protest if he wanted to, let him take the matter to the Administrative Appeals Tribunal. He then bears the onus of proving that that information is correct. If he chooses not to do so, Customs can think, 'Maybe he is a crook,' and then they can send the matter off overseas to be investigated. They did not have to seize his goods first and then go and find out if they could get the information.

Mr MURPHY—Precisely.

Mr Rodda—That is not the way you go about it.

Mr MURPHY—That is why I would just like, succinctly, for Mr Rodda—I do not want to delay the committee's inquiries any more than I have to because this is a complex issue—to get his views on each of those four areas that I have raised arising from his evidence to this committee. We can then ask Customs about it when we get to Customs.

Mr Rodda—Are you happy with going on?

Mr MURPHY—I think we can move on to the second one, which is that they ignored evidence that suggested Mr Tomson was innocent. Specifically, what evidence was that?

Mr Rodda—Well, madam chair has just referred to some of the aspects. When Mr Grausam was questioning the people at Trans Air Cargo, he asked, 'Are these prices too low?' and they said, 'No. Anyone can buy at these prices.' But that was ignored when the matter went to trial.

CHAIR—Say that again.

Mr Rodda—I will go through and identify that specific section during the adjournment. I will take you to that page and paragraph.

Mr MURPHY—If it helps the committee and Mr Rodda could identify that in his submission, that would help us.

Mr Rodda—It is somewhere between pages 42 and 86. I am not sure which one it is. I will locate it during the adjournment. I do recall that specific reference where he was asked that question.

Mr MURPHY—Apart from that evidence, was there anything else that you believe the Customs officers ignored as evidence?

Mr Rodda—Yes. There was the minute from Mr Delmenico dealing with the prices in Taiwan. He was told that at certain times of the year anyone can buy apparel by the kilo. That is not even a price per garment. One would expect if you buy goods by the kilo, you are buying at very low prices. There was also the fact that they ignored their own Customs Cooperation Council document, that was put into evidence during Mr Tomson's trial, about the sale of disposal stocks.

Mr MURPHY—What was the document?

Mr Rodda—It was the Customs Cooperation Council study.

CHAIR—What does that require?

Mr MURPHY—If you could dig that out.

Mr Rodda—Yes.

CHAIR—What does that document require Customs to do?

Mr Rodda—It requires it to have regard to the fact that goods are often sold for quite low prices, prices much lower than the cost of production. This is what they were investigating.

Mr MURPHY—That is three elements to that part.

Mr KERR—I need your help.

Mr MURPHY—He is going to dig it out, Duncan.

Mr KERR—The document he referred to in Mr Grausam's statement. There were some passages referred to.

CHAIR—He is going to find that when we take a break.

Mr MURPHY—It makes it easy, Duncan. We would be here for hours.

CHAIR—I read from page 56.

Mr KERR—Thanks.

Mr MURPHY—Is there anything else under that heading, evidence that you felt was ignored by Customs that you would like to highlight after the adjournment?

Mr Rodda—I am pretty sure there will be, but I need to obtain all the documents I got under the disclosure order to go through that to find them. There is a substantial amount of that material.

Mr MURPHY—The next element is sworn false information to obtain a search warrant. So you are alleging that the officers of Customs have sworn false information.

Mr Rodda—Yes. We have already discussed that this morning. I think it may have been before you came in. But there was another one as well, I think in relation to the Cameron Trading shipment. I may even have that one with me, but I will have a look during the adjournment and see if I have that.

Mr MURPHY—Would you mind locating those two for me. If I missed them, I would like to have another look at it.

Mr Rodda—Yes.

Mr MURPHY—Finally, your belief that the Customs officers generally pursued Mr Tomson for no other reason than to destroy his business and his business interests.

Mr Rodda—That is a conclusion that I came to from the entire conduct of the Customs investigation, seizure and detention process. Two of his shipments of goods were detained, for example. Even though apparently no evidence of wrongdoing was found in relation to those shipments, they were never returned to them. He was not charged in relation to those shipments, but they were never returned. No explanation has ever been given. There was also the observation made to me by the chief inspector of investigation in Brisbane that a particular officer in Customs was out to get Mr Tomson.

Mr MURPHY—Did you forward any communications to Customs about that to have it returned?

CHAIR—And who was the particular Customs officer?

Mr Rodda—Mr Grausam was the officer who was named as the person who was trying to get Mr Tomson.

Mr KERR—I go to this passage at page 56. There is no doubt Mr Grausam, if you want to use that language, is out to get Mr Tomson. But if I look at that passage, what he is trying to do there when he explains it is to say we understand that you can buy things cheaply in Thailand. We are not troubled about that. But some people, even though they get them cheaply, actually then assert that they have purchased them for substantially less than they really have and we want to weed them out. In that sense, he is saying, 'We have our suspicions that Mr Tomson is such a fellow.'

CHAIR—They are saying that Tomson does this.

Mr KERR—Then the respondent says, 'Well, how are you going to prove it?' So there is a whole debate about that. That does not seem to me to be ignoring evidence. It seems to be, yes,

he has suspicions and he is trying to test it, saying, 'Most of these little fellows we do not have a problem with, but one or two we do.'

CHAIR—No, this one we do.

Mr KERR—He says some do. Obviously in this instance—

CHAIR—And we are asking about this person. He thinks he is greedy and dishonest.

Mr Rodda—I think that was Mr Grausam's statement too.

Mr KERR—An investigator can form a view and then they test that. Police, when they are investigating, form views and then they test them.

Mr Rodda—But the easiest way to test it in this case was to simply issue a demand for duties short paid.

Mr KERR—I understand your argument and I am not disputing that it would have been far easier. We wouldn't be sitting here. The other alternative is perhaps to go down to the market and find the people who are asserted to have sold these goods. There are a million ways it could have been done. The problem I have is that you are asserting, in using Mr Grausam's name, that he was ignoring evidence suggesting innocence and referring to a document that I do not think carries that construction. But I will look at the rest of the material.

CHAIR—When I read it out, I was simply making the point that it was quite clear from the statement that there was a statement of people from whom they were trying to get corroborative evidence to say, 'We believe this man is a crook and a cheat and we want you to prove it for us.' That is a fairly heavy thing to be saying to people in another jurisdiction.

Mr KERR—I do not think—

Mr Rodda—That passage certainly suggests a lack of objectivity.

Mr KERR—We can all read a passage, but I do not think that is what it says. Irrespective of that, frequently police put propositions asserting certain facts to people who may be able to provide information. If there is an allegation that somebody has stolen money or been involved in an act of terrorism or what have you, they will go around and ask all sorts of questions. Often they will have very strong suspicions.

CHAIR—There is no use denying that.

Mr KERR—But to expect people to clear their mind of any suspicion is beyond human capacity.

Mr Rodda—But when the answers to the questions you ask are answers that do not support your theory, you do not then totally disregard that and assume everyone is lying and then prosecute the person anyway.

Mr KERR—In a sense, the respondent says, 'How are you going to prove this?' There is a question about how you can ever find documents in this area, which if I read it very quickly, suggests that essentially you are in a swamp where none of this is properly documented. So the respondent, the person who has suspicions, is saying, 'Well, how would you ever prove this?'

Mr Rodda—But it was properly documented, you see. At the level at which Mr Tomson does business, all of the documentary that was needed was given to Customs. You only require the invoice, the packing list.

Mr KERR—I understand that technically what you say. They were believing these were falsified documents. That is the point. I understand there are other ways this could be dealt with. All I am saying is that it seems to me on the account I have heard thus far that your client probably is in a situation where, in the absence of hearing anything else, you would say he has got himself where he was doing very good business by picking up surplus materials. He attracted suspicion and he has ended up having his business ruined because Customs used a sledgehammer to crack the nut and could have used other proceedings. On its face, that is probably where I am up to at the moment. But I am pretty reluctant for us to make findings—

CHAIR—We are not making findings. We are asking questions.

Mr KERR—suggesting dishonesty or impropriety in forming suspicions.

Mr Rodda—Well, if I were in the shoes of the investigation officer and I saw prices being declared that I thought were just extremely low and certainly much lower than anything else I had seen anybody else declare, I would probably just reassess the value, issue a demand for duties short paid. If the person did not then pursue the matter in the Administrative Appeals Tribunal, I was send the matter off to the investigation branch with instructions that the matter should be pursued properly with an overseas investigation.

CHAIR—Mr Rodda, you were in Customs at one stage, weren't you?

Mr Rodda—Yes.

CHAIR—Did you ever in fact do that, what you have just described?

Mr Rodda—No. I was never put in the position to do that, but I did train the investigation branch staff in Queensland in the conduct of valuation investigation. It was one of my responsibilities in the department.

Mr MURPHY—I am not looking with my line of questioning to make findings. Yes, I agree at some stage we appear to be using a sledgehammer to crack a nut. In relation to the response you have just given, Mr Rodda, it will be interesting to see what the Customs officers tell us later as to why they did not just ask him at that point, as you suggest, to cough up and pay the duty. Why did they continue down the path they did? It obviously reaches a stage from what you are alleging that he has been manifestly treated unfairly. But equally, rules of natural justice dictate that we hear from the Customs officers and why they continued down that path. That is what we want to do. I am not looking to reinvent the original inquiry, but somewhere I would like to find

where the line can be drawn that the Customs officers were in error in continuing down the path they did. It would appear they have destroyed an honest man. That remains to be seen.

Dr WASHER—When we adjourn, we can clarify that. With this sole business of the trading mechanism that Mr Tomson had, he was in handbag factories, had overseas investments and outlets beyond this. To state that he lost $13,000 tied up by customs is not good. It would hardly bankrupt a man turning over $1 million. During the same period of time, to clarify the matter, 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. So you cannot say X leads to Y in this case and that was the only factor.

I can sympathise in that bankruptcy is very unpleasant. But there would have been many other factors prevailing on this. The court costs were allegedly, even though the court was delayed—I am embarrassed by the fact that it was delayed so long—paid ultimately and paid in the year preceding official bankruptcy. You had $13,000 plus $80,000. You come up still under $100,000. If you are trading $1 million with multiple factories and multiple outlets and multiple companies, that certainly would not alone bring you to your knees.

Mr Rodda—I will clarify something about the costs. Although Mr Tomson was paid some money to cover his legal costs, in fact he had not actually incurred any. The people who appeared for him in court and had been advising him throughout this period never actually gave him the bill.

Dr WASHER—I feel very sorry for Mr Tomson. I find it incomprehensible, having some business experience, that $13,000 is going to bankrupt you when you are turning over that in multiple companies and that is one aspect of it.

Mr CADMAN—But if you cannot hold any more, that is the end of your business.

Dr WASHER—There were other businesses. He was not relying on this one.

CHAIR—That is a good point.

Mr CADMAN—We can discuss that later.

CHAIR—Yes, I think so. We might take a break. We must hear from Customs before two o'clock. I think we want to hear from them very quickly. Do you want to continue?

Mr MURPHY—No.

CHAIR—I think we will want to have Mr Rodda and Mr Tomson back.

Mr KERR—I am happy with that. I should be gone by now, but I am finding this curious.

Mr Rodda—If I may, I would like to deal with the averments too.

CHAIR—I think we will have a break of seven minutes. We will resume at 12.50 p.m. There are two things that I put on notice that I want to know about. I want to know about the other businesses that Dr Washer has mentioned. My understanding previously had been that the business had collapsed because every shipment was being brought in was being seized and there was no point any more. Did that only relate to clothing, or did it relate to other imports as well?

Mr Rodda—He only imported fashion goods. There was some footwear and handbags, but that stopped with the Vamani shipment, didn't they, Peter? The Vamani shipment was the last one with footwear and handbags?

Mr P. Tomson—Yes.

Mr Rodda—Everything else was apparel after that. But he did get two shipments through in Brisbane for Diamond Ville. Two shipments were released in Brisbane in 1998.

CHAIR—Basically I understood that every time a shipment came in, Customs would seize it. It did not matter—

Mr Rodda—In Sydney, yes. Every shipment in New South Wales was detained or seized, yes

Mr KERR—I think your evidence was—just confirming what the chair says—that once Sydney became aware of his change of name, they informed Brisbane and then the same circumstances followed subsequently. He concluded that that would follow?

Mr Rodda—Yes.

CHAIR—So that was the end of the business?

Mr Rodda—Yes, correct.

Mr KERR—My concern was that you assert that Customs should have used an alternative procedure. My concern is that you had alternative legal procedures that you did not pursue. All I am saying is that this could be a complete stuff-up on everyone's behalf.

Mr Rodda—When you are a little person fighting the bureaucracy—

Mr KERR—I agree; it is difficult.

Mr Rodda—It is David and Goliath, and he did not have the money. It was as simple as that.

CHAIR—I am trying to get some handle on this money thing because what Mr Parragio says—

Mr KERR—Are we going to adjourn?

CHAIR—Parragio says they were saying that there was an unpaid potential revenue leakage of $230,000. So we are talking a lot more than $13,000. We will adjourn right now. We will be

back at 12.50 p.m. We will get those references from you. Then we will call Customs straight away. If you are happy to come back on a date to be fixed, we will resume. We will hear from Customs before one o'clock.

Proceedings suspended from 12.44 p.m. to 12.53 p.m.

DALEY, Mr Simon, Senior Executive Lawyer, Australian Government Solicitor (representing Australian Customs Service)

VORREITER, Mr Stephen, Senior Executive Lawyer, Australian Government Solicitor (representing Australian Customs Service)

GRANT, Mrs Marion Estelle, National Director, Border Compliance and Enforcement, Australian Customs Service

WOODWARD, Mr Lionel Barrie, Chief Executive Officer, Australian Customs Service

CHAIR—We will resume the hearing. During the break, we have determined that Mr Rodda will identify those sections of Mr Grausam's affidavit and hand them back to the committee for their deliberations. They have agreed that they will come back at a future date to give further evidence. We were grateful to have a briefing earlier on the way in which averments work. We will now hear some of that in our public hearing. The committee has received a submission from the Australian Customs Service, which it has authorised for publication. I would like to ask if anyone would like to make any corrections or additions to their submission and whether or not one or each of you might like to make an introductory statement.

Mr Woodward—There are no corrections. I would like to make an opening statement. There are a couple of preliminary points I think I should make. Firstly, the genesis of these events goes back to the 1987, 1988 et cetera. There were many changes which obviously took place following the Midford report, which you have mentioned, introduced by the former government, including changes in legislation and process. The second comment I wanted to make is that the inquiry has not been conducted in a vacuum. *60 Minutes* has produced a program which have already canvassed many of the issues raised before this committee. In the process, they made a number of quite stinging criticisms of not only Customs but its minister. I would like to cover some of those points. I accept that you want to stick to averments. I will get on to it, but I think it is incumbent upon me to make some comments.

CHAIR—Absolutely.

Mr Woodward—We in Customs believe that the *60 Minutes* program provided inaccurate and unfair reporting. We have written a formal complaint to *60 Minutes* indicating that we believe the broadcast has breached the commercial television code of conduct. I would like to table with the committee a copy of the complaint that we have lodged.

CHAIR—We might accept that as an exhibit.

Mr CADMAN—So moved.

Mr KERR—To assist, I cannot find the submission. Was that one we got earlier?

Mr CADMAN—It is about the second one down. It has 'IV' on it.

CHAIR—It has a little tag with 'IV' on it.

Mr Woodward—I will continue in relation to the *60 Minutes* program. The promotional material broadcast prior to the program going to air referred to a vindictive bureaucrat and an image of a retired customs officer. This person in fact had no dealings with the Tomson matter. The captions used misidentified the former comptroller-general and another former officer. They were corrected in a second program which *60 Minutes* ran last night. The broadcast claimed that Customs had told the program to 'go away and mind its own business'. In fact, material had been provided to the program by both Customs and the minister which was never referred to. Those documents are in fact attached to the documents that I have asked to be presented to the committee as an exhibit.

The program alleged that Mr Tomson was bankrupt in 1990, three years after Customs had seized the shipments, when in fact as you have heard today, he was declared bankrupt in 1999. The program consistently referred to Mr Rodda as Mr Tomson's lawyer. The material provided to Customs, particularly the complaint forwarded to Customs in February 2001, indicated that Mr Tomson's lawyers were the firm of Barwick Boitano, who advised that they were instructed to act for Mr Tomson. We understand that Mr Rodda has no certificate to practise as a solicitor or barrister.

There were assertions that costs of $240,000 had occurred as a result of Customs' action. There was no reference in that program, although it has been covered today, to costs in excess of $100,000 being paid as a result of an agreed settlement contained in the material provided to the program. If I can make one aside, we will in material which we will obviously need to present later after we have studied the evidence provided by Mr Rodda, there are parts of what he said which were misleading. Some things he said were simply wrong. An example of that was the reference to an ex gratia payment offered of $80,000 offered by Customs. In fact, there were protracted discussions between our legal advisors, Mr Tomson's, and ours, which led to an agreed settlement. The major difference, and it took some time—I say protracted—

CHAIR—I think 'protracted' is a good word. Eleven years later is a bit rich.

Mr Woodward—Well, I am talking about protracted discussions in relation to costs. A major area of disagreement was that acting with the advice and assistance of our legal advisors, $172,000 sought by Mr Rodda was not agreed to. That was one of the major areas of difference which led to the protracted discussions between the two parties. So the fact that there was an ex gratia payment is simply wrong.

CHAIR—We could get into a difficult situation. I have just been handed a note from Mr Rodda that says he was admitted to practise as a barrister of the Supreme Court of New South Wales on 9 February 1990. It says, 'Check with the prothonotary's office if you wish.'

Mr Woodward—Well, we have checked that.

CHAIR—Are you saying he is telling me a lie?

Mr Woodward—I will repeat the words I used. He has no certificate to practise as a solicitor or barrister. His own submission to the committee indicates that he has never practised at the private bar; I think they are his words. If you look at the precise words—

CHAIR—You indicated in what you said, Mr Woodward—I am sorry to be picky, but you are being picky back—that he was somehow holding himself out to be a lawyer when he was not one. That is not a good idea.

Mr Woodward—I am making no assertion other than the point that Mr Tomson's lawyers were Barwick Boitano, who advised us that they were instructed to work for this person.

CHAIR—I am a solicitor. I hold a current practising certificate. I just got the new one. I need a piece of paper to do that. I believe if you are at the bar you do not go through that motion, do you? Duncan, you are at the bar.

Mr KERR—You do now. You have to now. In Tasmania you do not need to but everywhere else you need to.

Mr Woodward—Well, that is something that can be checked separately. At the moment, I hold to the comment that Mr Rodda has no certificate to practise as a solicitor or barrister. If I am wrong, I obviously apologise.

Mr MURPHY—Mr Woodward, is that significant in relation to the allegations he is making against your officers in relation to the investigation?

Mr Woodward—It is significant only in relation to the *60 Minutes* program. It was a significant point in relation to the debate over whether or not—

CHAIR—He made it quite clear in evidence here today that he is a lawyer and that has been giving the man legal advice. We might bear all that in mind.

Mr Woodward—I will keep going. There were claims in the program that Mr Tomson was never convicted against customs law.

CHAIR—We dealt with that this morning.

Mr Woodward—Indeed. I stress I am dealing with hindsight; we have had to rely largely on files. Mr Rodda has had the advantage of being involved in it for—

CHAIR—No. That business about Mr Tomson is in the submission which has been on the Internet.

Mr Woodward—That is right. The point I am making is that the investigation in relation to the matters in 1987—again, I use the words 'not a vacuum'—

CHAIR—In contrast with Midford.

Mr Woodward—The investigation was conducted against a background that Mr Tomson had been convicted.

CHAIR—I think we dealt with that this morning. Do you want to go on?

Mr Woodward—I will go on. All Customs' recent dealings on this matter have been through Barwick Boitano, who advised that they were operating under instructions from Mr Tomson. The principal solicitor dealing with this matter, Mr Barwick, was removed from the role of legal practitioners in April 2002. The program claimed that Customs had not produced one iota of evidence against Mr Tomson. No reference was made to the three categories of evidence submitted by Customs and considered by the court—namely, firstly the divergence of particulars in the documents produced to Australia in the exporting countries, which has been discussed this morning; secondly, the evidence given by Customs' expert witness, Mr Prelea, which was commented on by Mr Rodda this morning; and the despatch of money overseas, which was referred to by Dr Washer.

Returning to the issue of averments, the ruling of the magistrate took into account submissions from Mr Tomson's legal representative and ruled out certain aspects of the averments. Nevertheless he decided that a prima facie case existed.

CHAIR—That is the important point for us to be consider about averments because it was held that despite the fact that evidence was not called, the averment was in fact prima facie evidence and therefore they had to go and call their defence. That is the end point for us to have to do with. The parts ruled out were findings not as to fact but as to law. We know where you have a mixed one, that part which is as to law is struck out and the other part stands. That is in the law.

Mr Woodward—I stress I am not a lawyer.

CHAIR—Let me tell you—

Mr Woodward—I accept entirely what you say.

CHAIR—That is already in submissions we have received from the Attorney-General and submissions from the Law Council of Australia.

Mr Woodward—We do have one problem with that, I think, as well, but we will come to that in a few minutes. Mr Rodda in his submission has suggested that the averments were deliberately false without detailing the basis of the assertion. Mr Murphy picked that up to an extent. Material on the consideration of the averments in this case is included in papers which I would now like to table as an exhibit. They are quite extensive. They run to something like 12 or 14 pages. I pass them to be admitted.

CHAIR—Thank you.

Mr Woodward—In summary, on the specific issue of averments in the Tomson case, a number of points should be made. No submission or comment to challenge whether a prima facie case had been made out were made on behalf of Mr Tomson, even though he was invited to

do so. Mr Tomson was represented by counsel who was a former magistrate and a lawyer of considerable experience, particularly in administration of the criminal justice system.

CHAIR—I think we heard about that this morning, about whether or not it is their obligation to prove their case.

Mr Woodward—My particular point is that counsel was experienced. He was not some junior person who had—

CHAIR—But he was not expected to be there.

Mr Woodward—You are going back into 1987. I am sure Mr Rodda has more knowledge than I do of what actually happened in the space of two hours that he referred to. No objections were made in relation to most of the averments. The prosecution called evidence in relation to each question or fact to be proved save for the formal matter that the informant was a Customs officer and had the appropriation delegation. So the averments in fact had little if any work to do. The principal objection raised by the defendant on the averments relating to striking out the world 'false' and the word 'duty', and these were upheld as they amounted to averments of law. As a consequence, any averments which were not in a permissible form were not relied on by the magistrate.

CHAIR—They did not need to.

Mr Woodward—What I am stating is a matter of fact. The matter is about averments. Mr Rodda is now suggesting averments were false and fabricated. The magistrate came to a different conclusion and it is significant that Mr Tomson's legal representative made no submissions to the magistrate that the averments were false. It is important to remember that when averments were made, Customs did not have before it the evidence which was adduced by the defendants. Mr Tomson had also declined to cooperate with the investigation. The events to which this matter took place 16 years ago, which is a real problem for us at the moment because we are struggling going through files. On receipt of the submission from Barwick Boitano in February 2001, a barrister was asked by Customs to provide 'advice on whether there was any substance in the allegations made and if further examination is warranted'. Counsel did a considerable amount of work. This is important and is sufficiently important.

I refer again to the *60 Minutes* program last night, which was extremely critical of the minister's failure to release a report. He and I had discussed that. I discussed it with him over the telephone again yesterday. We had preferred that something such as this be made available to this committee. It was appropriate that we present ourselves to the committee and not present ourselves to *60 Minutes* or in fact any other media outlet.

What I think is appropriate—and the minister has agreed, although we have not yet given a copy to Mr Tomson; I will undertake to do that following these proceedings—is that the committee has a copy of the report which we have, which is quite an extensive report. It goes through many of the allegations, certainly including all of the allegations mentioned by Mr Murphy and many others, which are contained in the papers. I will go on later to say how we want to continue that work. If it is appropriate, I would like to table that report as an exhibit.

CHAIR—We would like that very much. Thank you very much. Who was the barrister concerned?

Mr Woodward—Mr Bellew.

CHAIR—Is he someone who practises in customs law?

Mr Woodward—I think he was a prosecutor, from memory. My recollection is that he has a fair bit of experience in criminal law, not in relation to—

CHAIR—He is not an expert in customs law. That is what I need to know.

Mr Woodward—I do not believe so.

Mr Daley—His background is really that of a prosecutor. He does narcotics prosecutions that are customs related. I do not think he has a great deal of experience with customs prosecutions of the kind we are concerned with.

CHAIR—So who chose him?

Mr Woodward—There were a number of names suggested to one of my deputies. We were clearly looking for someone who had the sort of independence but also an independence from Customs. Out of a panel of names of prosecutors in criminal law and narcotics prosecutions, out his came. I do not think there is any more science in this than that. I had never heard of him. He is not one of my mates.

CHAIR—Thank you for that. Could somebody move that we accept the report as an exhibit?

Mr MURPHY—Yes, I will.

CHAIR—Could somebody also move that we accept the 12-page document handed to me as a supplementary submission?

Mr CADMAN—I will.

Mr MURPHY—I want to ask a few preliminary questions. I am going to have to leave here in about 15 minutes.

CHAIR—Mr Woodward, you have more to give, I take it?

Mr Woodward—I do.

Mr MURPHY—That is fine.

CHAIR—I think we will let him continue.

Mr MURPHY—Would you anticipate being finished in 15 minutes or so?

Mr Woodward—Yes. I do not think anything I am saying is unrelated to the subject. The review, which I have just presented to the committee, is relevant for a number of reasons. Firstly, it does bear on all of the extremely serious allegations made by Mr Rodda and which I take seriously. I said, 'I need someone independent of Customs to have a look at this, someone fresh.' I think you will understand why I wanted to do that. He undertook his work. On 15 June, we wrote to Barwick Boitano. The letter attached a series of questions from counsel because he could not conclude his work without providing the opportunity for additional material to be provided. Nothing came back. A further letter was sent on 7 December 2001. This indicated, and I quote:

> Counsel has completed his examination of the allegations made. On the basis of the available material, and the absence of further particulars and information requested in June 2001, counsel has concluded that the allegations are baseless and incapable of being particularised.

Attached to that letter was a summary of counsel's conclusions. In the intervening period, between June when we first wrote to Barwick Boitano and December when those conclusions were conveyed, the minister's office met with Mr Rodda and Mr Cadman on the matter in late August. Answers to questions on notice of the matter were provided on 6 August 2001 and 14 May 2002. In addition, counsel had had a discussion with Mr Barwick on 31 August 2001 in relation to the inquiry he was carrying out. During the discussion, counsel raised the issue of the outstanding particulars that had been requested on 15 June 2001. Mr Barwick indicated they would be likely to be provided. Nonetheless, Customs has now seen an unsigned copy of a letter dated 5 September 2001 from Barwick Boitano. That letter declines to provide any further information in answer to Customs' request and calls instead for an independent inquiry. Similar comments are made in Mr Rodda's submission to the committee.

There are several points we want to make. Customs has no record of receipt of that letter, despite having done extensive searches. Customs' solicitors made a number of attempts orally and in writing to have Mr Barwick of Barwick Boitano confirm that a letter was in fact sent to Customs. There was oral contact on 23 May, in writing on 23 May, 30 May and 6 June and a message was left on 27 May to obtain from them a signed copy. The copy provided to us from the House of Representatives inquiry was not signed. Additionally, Customs recently became aware that Mr Barwick currently does not have an entitlement to practice as a solicitor, which may in part explain our difficulty in obtaining a response from the firm. For this reason, Customs' solicitors wrote to the managing partner of Barwick Boitano on 11 June 2003 to seek clarification of whether that letter was in fact ever sent. A response to the letter was received on 19 June. It says:

> The letter appears to have been generated in our office and despatched in the ordinary course of business by ordinary prepaid post.

It then goes on to say:

> The writer is, of course, quite unable to certify that the subject letter was actually posted since he is not personally responsible for physically conveying outgoing mail to the post office. The member of our staff then responsible for the despatch of mail is no longer in our employ.

As matters currently stand, Customs is unable to accept that it ever received the letter dated 5 September or any other response to its June letter.

CHAIR—Well, it did not tell you anything anyway, did it?

Mr Woodward—That is the point that I was going to make. Having seen the unsigned letter, he takes the matter no further and does not provide the information we sought.

CHAIR—Unfortunately, I think this committee will be in a better position because we are actually able to take evidence on oath and in public. I think perhaps that is a better way than to be behind closed doors.

Mr Woodward—I have no problem with that. I might end that part of it. Customs has previously indicated that it is willing to consider any material which would support allegations made by Mr Tomson, his legal advisers or Mr Rodda. Indeed, Customs has now asked counsel to look at material provided by Mr Rodda to the House of Representatives inquiry—and it is extensive—as well as being provided with all material in Customs' possession, including material he has previously examined. Counsel has been asked to advise whether, firstly, there is any substance to the allegations.

CHAIR—With respect, Mr Woodward, if you just tell us that you are dealing with counsel, that is fine. We wouldn't want that to attempt to persuade this committee which way we might think. We will have to see the evidence as we see it best.

Mr Woodward—Would you prefer that I do not tell the committee what it is we have asked counsel to do?

CHAIR—By all means tell us.

Mr Woodward—In other words, if I can summarise, we are saying, 'Don't just have a look at the material you have already looked at and which is reported on. We want you to go back further into the 1987 and 1988 period and look at how the investigation was conducted. If you see problems in it, then tell us.' My commitment is that if Customs—and I have no responsibility, as you have said—has done something wrong, it is my responsibility to ensure that it is set right.

CHAIR—We are very concerned about what happened in that 1987-88 period and why it took to 2002 to come to court with a big gap, as we heard in the evidence this morning. Just to get your position right, are you the comptroller's successor, with the title having been abolished? Did you follow Frank Kelly?

Mr Woodward—I am the last ever comptroller and the first ever chief executive officer. Yes, I followed Mr Kelly. We will pick up separately the further details of the inquiry. I will make one additional point. I know there is always the possibility that someone could suggest that Customs is aimed at covering things up. That is not my desire. I do put that—

CHAIR—Mr Woodward, if you have a good read of this, you will see that the culture of Customs in the period we are discussing was pretty awful. It predated you. It is no criticism of

you at all. If I read you passages of what we have found in that hearing about the culture of Customs, it was pretty off. We are talking about that same period. And indeed some of the people who were involved in this case were also involved in Mr Tomson's case at the same time.

Mr Woodward—I understand the point are you making. I will not pursue that particular point at the moment. What I am saying is that because of this, we would ensure that a copy of counsel's report is made available to the minister directly as well as to us. In other words, it would not be subject to prior analysis by Customs. The second point that I should make, which is important, is that the minister is also considering the options for an external review of this matter. The activities in the late 1980s need to be seen within the context of the then government putting forward amendments to the valuation provisions, which were designed as part of a legislative attack against certain avoidance and minimisation practices used by importers in valuing goods imported into the country. Again, this is important because it provides the context. There was amended legislation, with second reading speeches clearly indicating that there was concern about valuation and undervaluation occurring. Changes were made to the legislation. There was a clear inference that Customs would do something about it. From what I can see from the papers, there was no objection by the opposition at that time.

So far as material was provided to the committee on 5 May which was picked up this morning, the inference to be drawn from statements made in Mr Rodda's letter and again this morning is that Customs had a reason to want the material that he referred to suppressed. Customs had no reason to do so. Indeed, I reject any suggestion that Customs as an organisation had any involvement in the events that occurred at Mr Rodda's premises over the period 25 to 27 April. To my knowledge, Customs has not been approached by New South Wales police in relation to the matter. When he became aware of this submission, the minister wrote to the producer of *60 Minutes*, who raised a number of issues, indicating that Mr Rodda believed that the matters are connected to the Tomson matters and should refer it without delay to the Australian Federal Police. As far as I am aware, this has not occurred.

Finally, I will turn to the substantive issue before the committee, the use of averment provisions. A more substantive statement on the principles in the cases that have been included in the submission is included in the documentation which I have now provided to the committee. There are a couple of points I could make. The historical underpinning for the viability of averments in Customs legislation is covered in some detail in paragraphs 21 to 28 of our submission. In short, the availability of averments recognises the peculiar difficulties which Customs faces in proving offences arising out of the importation of goods because the elements of such offences will concern matters about which the importer will inevitably have far greater knowledge than Customs. Because most customs investigations and prosecutions involve imported goods, many facets of the importation process have a foreign component. For example, negotiations will take place overseas. Contracts may be signed overseas. Payments will be received there and sometimes made there and witnesses to the truth of these matters and the documents which support them will often be located outside Australia. The potential difficulties are all the more acute when importations are via the postal system.

It should also be noted that provisions allowing for averments like evidentiary aids are found in a number of Commonwealth statutes. They are detailed in paragraphs 68 to 75 of appendix D of our submission. I just mention a few. The new Taxation Administration Act 1999, which covers a fairly recent introduction of averment provisions, is covered in that submission.

In giving consideration to the question of whether the availability of averments in customs prosecutions is appropriate, it is important that the committee understands the evidentiary effect of an averment and the way in which they are actually used. These issues are canvassed in paragraphs 18 to 28 of our submission. Under the Customs Act, averments are an evidentiary aid and allow the prosecution to make an allegation of fact which is, and I emphasise, prima facie evidence of the fact averred. Averments do not reverse the onus of proof. That is, although an averment may assist a magistrate to conclude that the prosecution has established a case to the prima facie level, the prosecution nevertheless must still prove its case to the requisite standard. In the local court this will be beyond reasonable doubt. Accordingly, it may be that averment of a fact without other evidence will not be sufficient to persuade a court to find that a fact has been proven beyond reasonable doubt. There is a discussion of that in the ALRC 60.

Another way of looking at this is that averments do not alter the standard of proof. Accordingly, even though a fact is averred, the prosecution must still establish that fact beyond reasonable doubt and may require other evidence to satisfy a court to that standard. For this reason, Customs contends that the submission in paragraph 4 of the Law Council submission, which is that the averment system puts Australia in breach of its obligations under the international covenant on civil and political rights, in our view, should not be accepted.

The use of averments does not mean the defendant bears the onus of disproving the fact averred. Rather, it would be enough if evidence called by the defendant casts sufficient doubt on the fact averred so that the court would be obliged to give the benefit of that doubt to the defendant. The averments cannot be used in proceedings involving an indictable offence or an offence directly punishable by imprisonment. Averments cannot be used to aver intent or, more accurately, such an averment will not carry prima facie evidentiary value. Averments cannot be used to aver a question of law or, more accurately, such an averment will not carry prima facie evidentiary value.

Our submission sets out the policy approach which governs the way in which averments are used in practice. It is also emphasised that this probably is consistent with the principles in ALRC 60 and 95. More recently, in ALRC report No. 95, the ALRC noted that ALRC 60 had considered the issue on averments carefully and had given support to the averment process having regard to the specific nature of customs and excise prosecutions. ALRC 95 then repeated the recommendation in ALRC 60 that section 255 of the Customs Act be retained but with the addition of the safeguard that the averments can be disallowed where the court considers their use beyond just the defendant. Those recommendations are presently before the government.

My last two very quick comments are that the Minister for Justice and Customs has asked me to specifically draw to the committee's attention the recommendations 13.1, 13.2 and 13.3 in the ALRC report dealing with averments. The minister is of the view that these recommendations can be accepted by the government and has written to the Treasurer and the Attorney-General seeking their agreement to announcing the acceptance of the recommendations as soon as possible.

CHAIR—Thank you for that.

Mr MURPHY—Mr Woodward, could I ask you a few quick questions.

CHAIR—First, is that the same document or is that a separate document?

Mr Woodward—The big one is described as the Bellew report.

CHAIR—No, this one.

Mr Woodward—That is something that I mentioned earlier , which is a summary of the major cases.

CHAIR—Can we have that written version, or do you want to keep that?

Mr Woodward—These are my speaking notes.

CHAIR—Yes.

Mr Woodward—Well, I have adlibbed quite a bit in my process.

CHAIR—We have a transcript. I did say Mr Murphy could ask the first couple of questions because he has to go.

Mr MURPHY—Mr Woodward, for what period have you been the head of Customs?

Mr Woodward—Since 1994.

Mr MURPHY—When did you first learn of the case of Mr Tomson?

Mr Woodward—The first I put any particular focus on it was when I received a letter from Mr Rodda somewhere around about the same time I think Mr Cadman made an approach to me.

CHAIR—When was that?

Mr Woodward—It was 15 September 2000.

Mr MURPHY—So prior to that—

Mr Woodward—There are hundreds of cases of this type. I had no particular focus on this in any way. Undoubtedly, there would have been generalised reports.

CHAIR There are hundreds of cases where you are prosecuted, get chucked out of court and do not settle the court case for years?

Mr Woodward—There are hundreds of cases where—

CHAIR—Where you don't settle the court case for years?

Mr Woodward—There are hundreds of prosecution cases which I do not focus on. This one was brought into my focus by Mr Cadman and subsequently by Mr Rodda's submission.

Mr MURPHY—Do you feel that Mr Tomson has been treated fairly by Customs?

Mr Woodward—From what I have seen so far—and one of the reasons why I want counsel to go back early in the court case—is that from what I have seen in relation to that case I have no particular problems with the way in which the case was run. I am relying in essence on the file material that has been brought before me. There is no doubt that in the earlier period—and I have stressed earlier the context in which undervaluation was pursued; there had just been amendments of the legislation—of concern being expressed on the part of the then government about fraud in relation to valuation, I can well understand a very rigorous approach being adopted by Customs officers at the time. There is no doubt it was extremely vigorous.

Mr MURPHY—Finally, before I depart, because I do not think I will be able to get back here after question time as I have other commitments, would you be able to provide a response to the responses that Mr Rodda gave to my questions in those four areas that he identified in his submission? He does make serious allegations, and we have only heard his side of the story. It would be helpful to the committee if you could give a detailed response, because he has pointed to specific documentation.

CHAIR—I think also we are clearly not going to finish taking evidence from Customs today. Customs will come back. I think you said you were going away.

Mr Woodward—I will be away tomorrow for a week.

CHAIR—We will negotiate a time to come back.

Mr Woodward—We will do that. I emphasise that all those issues and other criticisms of that kind are in fact covered in the Bellew report, which we have just made available.

CHAIR—I am sorry, but Mr Bellew isn't here to tell us about it.

Mr Woodward—I understand that.

Mr MURPHY—I think—

Mr KERR—Excuse me, but it may actually be quite a useful exercise.

CHAIR—It may well be.

Mr KERR—But, as I say, I have trouble that we are going to spend an awful lot of time trying to work out delineations of and judgments about conduct going back into the 1980s, 1987 and before. But perhaps we ought to be satisfied that there is a full and transparent process for reviewing and ascertaining the fairness of processes, given the sort of seriousness that Mr Woodward asserts this should be treated with and which we all agree. Maybe it would not be a bad thing to meet with counsel who has done with this work—

CHAIR—With respect, that is something we will discuss in the committee. I think nonetheless John is entitled to ask his questions.

Mr MURPHY—Notwithstanding that, we will look at those exhibits and we will not be able to ask any questions today about them. Obviously, there will not be time to get through them. But I think in the interests of natural justice you should have the right to respond to those serious allegations. If you could go back to the transcript of what Mr Rodda said here this morning in response to my questions, I would appreciate you giving a detailed rebuttal, as I would expect you would, of the allegations that were made. We will have an opportunity to ask further questions at a later time.

CHAIR—Did you want to add something else. There are a couple of questions I would like to begin with. In the Midford report, one of the recommendations we made was that a copy of all briefs to counsel should be kept. They should only be destroyed or returned to source if ordered by the court explicitly to do so. I was wondering whether or not the brief to counsel was still in existence in your records and if, so, if we could have it.

Mr Woodward—What we can do is provide whatever we have in relation to that. I stress that we are relying on old records, and old records get either lost or destroyed. But anything we have, we will certainly make available to the committee.

CHAIR—A big question of concern to me is what happened between 1990, when an offer was made to Mr Tomson that he could have his goods back for $240,000, and 20 summonses being issued in 1992, which just happened to coincide with the peak of the Midford inquiry. I will perhaps add to the background question. You said the government was concerned. I would remind you that the government was dragged kicking and screaming into having the Midford inquiry by the public accounts committee. In fact, the minister of the day opposed it quite vehemently in the Senate. It was only referred to the public accounts committee with the Democrats agreeing on my motion that the matter be referred. It came to my attention first from reports from Malaysia that Customs officers had been in Malaysia breaking the law in Malaysia. It had caused a diplomatic incident. It was from there that we went and finally had this inquiry.

What we found—and in this report it will say—is that the culture of Customs at that time was very poor indeed. Their practices were poor. This case is held at that same time. Some of the same people are involved. What I am concerned about is that what happened in that period I think it is really quite crucial. I would like to know what brief was given to counsel, whether or not he was the chosen counsel of the day, whether or not the chosen counsel of the day was jammed and this guy got the brief and turned up. His opening statement was that he did not expect the defendant to be represented. That the defendant had been treated without the proper courtesies and without the proper things having been done I think is of great concern.

Mr Daley—I might speak in relation to that. Our understanding is that the reason he mentioned that Mr Tomson was unrepresented was because he had come to court ready to formally prove all aspects of the matter rather than simply tender documents by agreement with the other party. There was agreement with the other party. In other words, he came to court ready to present the entire case, as you do if there is an unrepresented defendant.

CHAIR—The point I was making is that he had not been given any documentation in the past.

Mr Daley—I think that is something that needs to be thoroughly checked against the material. Our understanding is that there were documents served on his previous solicitors, who had then ceased representation of Mr Tomson just shortly before the hearing date that was set down. I think that needs to be thoroughly checked before we could give an absolutely clear indication that there was no service of documents by agreement with the other party. That is not our understanding. Indeed, most of the documents that were ultimately tendered were Mr Tomson's own documents.

CHAIR—But counsel did say that he was going to call witnesses and there was a witness list. That was not completed.

Mr Daley—In relation to evidence, that evidence was admissible without the need for witnesses to testify to it.

CHAIR—That is not the point. You heard what we went through this morning.

Mr Daley—The answer to it is that there was no need for those witnesses to be called to prove those particular documents. They had an evidentiary certificate. The evidence was admissible.

CHAIR—They were allowed into evidence because it had been stated that the witnesses were going to be called. If the witnesses were not going to be called –

Mr Daley—They were allowed in as business records. There was no need for the witness to testify in relation to those documents.

CHAIR—A statement was made that the witnesses were to be called, as we heard this morning.

Mr KERR—But in the course of a trial, the decisions you make are adjusted according to concessions made by the other side. Presumably, if without any objection all the documents have been admitted, then the necessity to proceed with the course you had initially indicated you would proceed with might be obviated. People make tactical decisions throughout. I do not know why counsel did not object to the admission of those documents.

CHAIR—You heard this morning.

Mr KERR—No. The evidence this morning was that we did not know.

Mr Daley—I think the transcript really does need to be put before this committee.

Mr KERR—The evidence this morning was that the witness did not know why counsel had not objected to the documents going into evidence. They said that they had made a forensic judgment on the expectation that witnesses would be coming forward. But that would not necessarily be known to the prosecutor. The prosecutor simply stands up and says, 'This is my intention.' They then ask whether there are any objections. All the documents go in. It does not mean that then he would have in his mind whatsoever the need to call some people to prove what has been formally conceded. I do not know that if I or you were in that position we would not do the same.

CHAIR—I think you said earlier that if you were the defendant, you would have been delighted if they had found a case.

Mr KERR—I do not know. But all I am saying is that you would have thought that at that point the only documents are those which on their face do not go very far to establish beyond reasonable doubt the elements of the offence. So I think I would have been delighted at that point.

CHAIR—There is a difficulty as to the nature of the prosecution. In New South Wales and Queensland, they are regarded as criminal in nature and therefore require a criminal proof. But in Victoria they are regarded as civil and therefore require a civil proof. This seems to me to be a very difficult question, where we are relying on averments and have competing jurisdictional levels of proof.

Mr Vorreiter—Well, in the local court, a Customs prosecution is always regarded as a criminal matter and is to be proven to the criminal standard. That is actually common around the country.

CHAIR—It is common in Victoria as well?

Mr Vorreiter—Indeed it is. What you may be thinking of is a Customs prosecution commenced in the district or county court or the Supreme Court—the standard of proof is slightly different. It is the so-called Briggenshaw standard of proof, which I think was referred to in the private meeting of this committee. So there is no difference between the jurisdictions when you are considering the same level of court or the same jurisdiction of court.

CHAIR—What if you start in the District Court in New South Wales?

Mr Daley—It is a civil proceeding.

Mr Vorreiter—It is Customs' option to commence in any of those three jurisdictions.

CHAIR—So there was a deliberate decision made again to make this a criminal prosecution, just as it was in Midford?

Mr Vorreiter—This was not the same sort of prosecution as in Midford.

CHAIR—No, it was not. That was under the Crimes Act. This is a Customs Act prosecution.

Mr Woodward—It was not a prosecution under the Crimes Act.

CHAIR—No. It is under the Customs Act.

Mr KERR—In terms of procedural integrity, one of the things that happens in the criminal jurisdiction is that there is always an independent assessment through the DPP. I suppose one of the issues that concerns me, not from the point of view of averments but simply to clarify why this may have actually ended up so messy, without putting any imputations on messy beyond that, is a suggestion that this was once in the hands of the DPP and the DPP may have actually

recommended the termination of the proceedings. That was the inference, I think. Customs decided to bat on notwithstanding. If that is the case, it does raise some, I suppose, sense that this may have been one bridge too far taken. I wonder whether we could have some clarification of this and, indeed, of the practice. These things do have some significant consequence. Maybe out of wisdom, when you start these things, there should be an independent check before you bat on.

Mr Daley—I will perhaps answer that by saying that in effect there were three independent checks in this particular case. The first was that the brief was despatched to the DPP. That was a brief in relation a rather large proportion of the shipments. I am not sure how many exactly. I think originally there were 84 shipments in question. Then it came down to 18 and that may have been the core brief that went to the DPP. As I understand it, the DPP concluded that there was not sufficient evidence to establish a case beyond reasonable doubt under section 29D of the Crimes Act. In other words, they could not confirm that there was a sufficient case for a Crimes Act prosecution but that nevertheless there may be sufficient for a Customs Act prosecution. They recommended that the brief be referred to the Australian Government Solicitor, who ordinarily advises on customs prosecutions. In due course, that brief then came to AGS. AGS expressed a view that there was sufficient for a prima facie case in relation to five of the shipments. That was confirmed by counsel shortly after the prosecution had in fact been commenced. The third independent check, if you like, is the magistrate. The magistrate formed the view that there was sufficient evidence to sustain a conviction for the purposes of a prima facie case.

CHAIR—On the evidence?

Mr Daley—That is the point I want to get to. That is what Customs says is the case—that the magistrate, on the whole of the prosecution case, said there was sufficient evidence to sustain a conviction. On that basis, he found a prima facie case. It is not the case that a magistrate relied on the averments, certainly not solely and we say not even principally. If you look at the decision of the magistrate on the prima facie case, it recites the various different categories of evidence relied on. I think averments get a mention in one passage only out of all the five shipments. So the specific point we say is that the magistrate did not rely solely, and certainly not even primarily, on the averments but on the balance of the documentary and other material, including the oral evidence of Mr Prelea, who was Customs' expert witness.

Mr KERR—I hope I do not intrude on others' questions. I want to tease out this business of the ACS. When a department or an agency refers a brief for prosecution to the DPP, the DPP takes over carriage of it if it accepts it and makes a decision not only as to whether there is a prima facie case but also as to even whether it should be proceeded with. That is because sometimes, yes, you can argue there is a prima facie case but on the material that sustains that prima facie case, no person really would think you would get a conviction.

When you briefed the ACS following the DPP's response to you—and that is entirely appropriate—you followed the advice you received, from what I understand. What is the relationship between the ACS and yourself? Does ACS act to your instructions, or do they in a sense exercise a similar independent assessment? To have batted on saying, 'Yes, there is a prima facie case,' may not have answered our committee's concerns or the fellow's concerns in this case, Mr Tomson's.

Dr WASHER—AGS did.

Mr KERR—Yes, AGS. With the advantage of being able to prefer averments, it is I think quite likely that in many instances you would be able to make out the fact that you can establish a prima facie case. But that does not then answer the question whether it is appropriate to proceed with a matter with all the costs involved et cetera.

Mr Daley—I will answer the questions in reverse order. Averments are not sworn just to establish a case that can go to court. You do not have an averment prepared unless there is some evidential support for that averment. It may not be admissible, for example,because it is overseas, but Customs has to have evidence which makes it clear enough to them that there is evidence to support an averment so it is not just an averment which is done on speculation. There must be material to support that. So that is the first point that I think needs to be emphasised.

As to the relationship between Customs and AGS, and bear in mind that I am from AGS and not from Customs, it is that is of solicitor and client. So Customs instructs AGS. Customs remains the prosecutor in a customs prosecution, so it is unlike the DPP. But AGS is asked to give advice as to whether there is a sufficient case to be commenced. Customs then looks at all the other public interest factors that normally go into making a decision whether to prosecute or not.

Mr KERR—You would regard yourself as bound by the same prosecutorial guidelines as—

Mr Daley—In operation, yes. In this case, there was independent counsel as well, who also gave an opinion that there was sufficient for a prima facie case. In other words, there was enough material to go to court with.

Mr KERR—I wanted to check that out because that was something that was concerning me.

Mr Daley—It is a little different between AGS and DPP, but the essential checks and balances are the same.

CHAIR—Who was it that gave the legal advice to proceed inside Customs?

Mr Daley—The first legal advice was from the Australian Government Solicitor and came from a solicitor called Lyn Brady.

CHAIR—No. Within Customs.

Mr Daley—I am not aware there was legal advice within Customs to proceed. Customs referred the matter to the DPP originally.

CHAIR—Somebody would have prepared that brief. Who would that have been?

Mr Daley—I am sorry. I am not sure of the name of the case officer.

CHAIR—Mr Miller? Would it be Mr Miller?

Mr Daley—I do not think so.

Mr Woodward—The name does not ring a bell.

Mrs Grant—The investigating case officer was Mr Grausam. It is usual practice for the case officers to put the brief of evidence together, and then it will go through the filtering and, I suppose, quality assurance process before—

Mr Daley—I think in Sydney at least the practice was for the legal services of Customs to pull the brief together but on the instructions of the investigating officer. That brief then goes to the legal services section of Customs for their view about the matter..

Mr KERR—Given that it has come down to us as the great battlers and we have five minutes before question time—

CHAIR—As question time is at two o'clock, I think we might have to break at this point. As I said, we would like you to come back. We have really only just begun. I thank you for bearing with us. We will arrange a time for you to come back so that the other members of the committee will be here as well. But thank you for being with us today. I am sorry we did not start earlier, but I think we have to go through this systematically.

Proceedings suspended from 1.52 p.m. to 4.08 p.m.

HUDSON, Mr Andrew Thomas, Immediate Past Chair, Customs and International Transactions Committee, Business Law Section, Law Council of Australia

LAW, Mr John Victor, Chair, Customs and International Transactions Committee, Business Law Section, Law Council of Australia

CHAIR—I declare open this session of the committee's inquiry into averment provisions in the Australian Customs legislation. This morning we took evidence from Mr Ian Rodda and Mr Peter Tomson as well as from the Australian Customs Service. The committee will be taking further evidence from these witnesses at a future public hearing, the date of which is to be determined by the committee. This afternoon we are taking evidence from the Law Council of Australia. We have received your submission, which we have published. Would you would like to add anything to that submission or make an opening statement?

Mr Law—Thank you. I would like to make some comments, as would my friend Mr Hudson. Mr Hudson has spent considerable time working with the Law Reform Commission on this very issue. If it pleases the inquiry, I would seek Mr Hudson's assistance in presenting our case. The basic proposition is that averments are a 19th century practice and procedure. In the 19th century, facts were difficult and cumbersome to prove. That was acknowledged by the first comptroller-general of customs, Mr Wollaston, in his publication in 1904, which is referred to in our written submissions. The 21st century Australian Customs Service is a sophisticated organisation with sophisticated forensic capabilities and skills. In our submission, averments are no longer necessary nor are they desirable. In our submission, averments carry too much weight before a tribunal of fact. It is also our submission that averments are repugnant to our cherished principle of a fair go. The international conventions that we have cited in our written submissions agree. We respectfully refer to the Conroy report in 1993, where it was found inter alia that Customs was inflexible, it was not accountable, and it demonstrated a lack of judgment and confusion of purpose.

The authority at the time for these propositions, and the stimulus for the Conroy report itself, was the celebrated Midford case. These days we have inter alia the allegations in Tomson. We make it clear that we are not referring to the allegations in Tomson because we ourselves hesitate to aver that the allegations are in fact correct. We do not have all the evidence so we cannot aver. But there are other cases we have cited as examples in our written submissions where averments have gone terribly wrong and have disadvantaged citizens.

It is our submission that some people would say that at least in part nothing much has changed in the Customs Service and in their method of doing things since Conroy. We are not saying that all Customs officers behave in an unsatisfactory way; far from it. However, we would say that there are many people who would say that not much has changed in the Customs culture in the last 10 years. There are those who would point to a deterioration of it in terms of public consultation, for example, and putting the citizen first.

We note in our submission that the operations of Customs as a matter of practice does not approach the standard of the ATO's taxpayer charter. They have a totally different way of operating which is unique to them. In our submission, the underlying policies of dealing with

citizens of the Taxation Office is far superior. My own experience as an attorney is that prosecutors complain bitterly if you challenge averments. I have had experience where even at the first return date of a hearing when people have been charged with serious offences, in one particular matter we found more than 20 alleged factual errors in the allegations against this client. The prosecutor made very strong submissions to the bench that it is highly irregular or unusual for anybody to challenge these averments as to fact. Strangely enough, after three years, the case against that person still has not proceeded. It seems to me that organisations which mount prosecutions in this way should not have the power to aver evidence, in our respectful submission.

CHAIR—Would you like to illuminate that three-year period?

Mr Law—To what extent?

CHAIR—A summons was issued?

Mr Law—Yes.

CHAIR—But it has never been set down for trial?

Mr Law—To the best of my knowledge, the particular defendant approached legal aid proactively expecting a prosecution. I am instructed that the prosecution has never proceeded.

CHAIR—Are there many like that?

Mr Law—I have no idea. I can only speak of that one instance. I have appeared at first instance many times, and quite often I would have to say that there are questions as to the facts put before the court. But I do not think it is unusual that the defendant would have a different view of the facts from the prosecutor. I would think that is usual. But this is one case I can think of where I was astounded by the indignation of the prosecutor that we would have the temerity to challenge their facts, yet I am sure we had more than 20 issues that we were taking with the facts in that particular case.

CHAIR—In that case, did you have to call evidence for the defence?

Mr Law—This was at the first return date.

CHAIR—You simply indicated that you wished to challenge the facts as averred?

Mr Law—Absolutely.

CHAIR—And accept the reverse onus of proof to do so?

Mr Law—I do not know that I can answer that. It all happened some time ago. If I said three years, it might have been two years. But it was somewhere between two and three years. I do not wish to mislead the committee. But I remember distinctly that this all happened very quickly in the interaction between myself and the opposing counsel and the magistrate. It is my experience when a magistrate is faced with strong allegations made by the state, the magistrate will take

those allegations very seriously. If there is any erring on either side to be done, it will be erring on the side of the prosecution, in my respectful submission.

CHAIR—Anyway, I interrupted you.

Mr Law—I have finished, thank you.

Mr Hudson—I would like to thank the inquiry for the opportunity of presenting today. My preliminary comment would be that once upon a time a long time ago the parliament conferred upon the Customs Service and others this averment power. It was done for a particular reason in particular circumstances. Taking into account that it confers a particular significant advantage on Customs in the sense that there is always a balance between the prosecuting authority and the defendant and the mere creation of the averment process places a significant advantage in the hands of the regulator or the government.

The original grant, as was hopefully set out in our submission, of the averment power was based on certain premises: that it would only be used as to certain non-controversial matters. It arose out of difficulties in securing direct evidence, most of which were geographical issues at the turn of the century. It was granted on the assumption that they would be accurately used or pleaded with some precision and that they would not be misused or abused over time.

Our position is that over time a number of those premises on which the averment power was granted have changed. We are still of the view that it confers a significant and perhaps unfair advantage on the prosecution as against a defendant. It is not warranted. It is an exception to general principles of practice that an authority should have the power of the type of an averment. It should only be given in very limited situations. I think Customs now has significantly better powers of investigation. I draw the committee's attention to examples recently.

There are additional document retention obligations imposed upon parties in industry. There are additional audit powers granted to Customs to secure evidence. They have the ability to go overseas much more readily and secure evidence from the officers overseas or in conjunction with overseas authorities. There is a recognition that in a number of the reported cases which we have drawn the committee's attention to in our submission, averments have been imprecisely used or improperly used to the point where averments have been struck down with significant expense to the taxpayer and indeed to all of us basically.

There have been suggestions and at least two recommendations by the Australian Law Reform Commission that the averment power deserves to be significantly reviewed. But it is the position of the Law Council in the current situation, given the amount of time that has passed since averments were originally created, that parliament should be encouraged to review it seriously and remove the averment power altogether. Should the parliament not feel so inclined, if you like, our fallback position would be for it to be significantly reviewed along the lines of what has been proposed by the Australian Law Reform Commission but with additional protections built in there, in particular concentrating on the position of the officer of customs who actually seeks to use an averment to ensure that they are properly focusing their minds on the statements they are making in the averment and the effect they could have on taxpayers.

CHAIR—Put them in their context. In 1901 when the first averment power was conferred on Customs, I think it is important to remember that the whole of the Commonwealth government was to be run by the proceeds from customs and excise. That was their only source of income to run it. So it was a pretty important source of revenue to be protected. With the customs houses around Australia, you see that they are usually vast sandstone monuments, which show the importance placed upon them as an instrument of government. Of course they predate income tax. The thing I am still having difficulty coming to terms with is this debate on the nature of the averments and whether they are criminal or whether or not customs prosecutions are criminal or civil in nature. We heard some evidence about that this morning. We still have the Labrador Liquor case in the High Court awaiting a judgment. But of course it makes a hell of a difference as to what standard of proof is to apply. As I understand it, currently if you are in the lower court, then an averment actually attracts a criminal standard of proof.

Mr Law—My understanding is that it does in the state of New South Wales in the courts there.

Mr Hudson—The difficulty is that in all the inferior or lesser jurisdictions, such as magistrates court type jurisdictions around Australia, customs prosecutions are all treated as a criminal prosecution with the appropriate standard of proof and issues regarding evidence and the need to put your defence in basically.

Mr MELHAM—You don't have a problem with that, do you?

Mr Hudson—I do not have a problem with that. It is when we go to the next level and we go to the various superior courts that I have a significant issue with it. Depending on what state you are in and what court you are in, it is almost a roll the dice exercise. In Victoria, it seems to be the civil standard of proof. In New South Wales, there is authority for the proposition that it is civil. The Labrador Liquor case is an appeal from the Queensland Supreme Court of Appeal suggesting, I think correctly, in my view, that it is a criminal matter. It is a criminal matter. I think it should be because of the nature of the prosecution. The penalties are significant. The type of—

Mr MELHAM—Well, they are not penal, are they?

Mr Hudson—Well, they are not penal, though in Queensland if you do not pay your fines, you can go to jail. There is certainly an element of moral turpitude, if you excuse the expression, associated with a prosecution 233 for smuggling or 234 for evasion.

Mr MELHAM—You have a problem with the Law Reform Commission report, because it did not recommend the removal of averment, did it?

Mr Hudson—No, it did not, but it did leave it open to parliament. I draw the committee's attention to paragraph 13.74 referred to in a page in our submission. It says that in the context it should be left to debate the merits of the averment process.

Mr MELHAM—Your submission also points out at the top of page 3 that the averment provisions appear to be a common feature of customs and excise legislation in other countries. So Australia is not alone in that regard?

Mr Hudson—It is not alone.

CHAIR—We took it lock, stock and barrel from the UK.

Mr Hudson—We did. It was certainly in the Victorian customs legislation. I had the ultimate excitement of reviewing the Victorian customs legislation.

CHAIR—Of 1873?

Mr Hudson—A very exciting piece of material. But that is where it came from ultimately. They still have it. I do not know how much they use it. In essence, if you were to characterise these customs prosecutions as a criminal, then to retain averments would be contrary to the international convention.

Mr MELHAM—But the jury is out as to whether they are criminal.

Mr Hudson—Well and truly.

Mr MELHAM—That is the problem?

Mr Hudson—That is the point.

CHAIR—But even if they bring it in, it may not determine it.

Mr Hudson—And even if it they decided it was civil, they would suggest you to drop the Briggenshaw approach, which says that the more serious it is, the higher the standard in the civil prosecution. So we are edging towards that anyway.

Mr Law—Mr Robertson, in his submissions before the High Court, made it quite plain that even if the action was a civil action because of the severity of the penalties et cetera, it would be appropriate that the criminal test would –

CHAIR—It would apply as a civil action.

Mr Law—These are the submissions of Alan Robertson, senior counsel, as best I can remember them. I might be wrong, but that is my understanding.

Mr MELHAM—Admissions can be made either way. What impresses me is the judgment of the court.

Mr Hudson—I must say there are a lot of people around Australia who cannot wait for the judgment. I think that is an issue. Even if the High Court determines they are civil in nature, averments still are unfair in their current form. They still give a significant, unfair advantage.

Mr MELHAM—Do you see the need for the retention of some of the averment provisions, or are you saying they should all go?

CHAIR—We are only looking at it with regard to customs. We are not going to go outside that, with respect. We are looking at customs only.

Mr MELHAM—That is what I understood.

Mr Hudson—My view is that there is probably no place for averments with customs prosecutions, whether civil or criminal.

Mr MELHAM—Are you able to advise the committee as to what that would mean to the revenues of the Commonwealth?

Mr Hudson—Not having undertaken the forensic exercise of going through the revenues, I would not have thought it made a significant difference, but I stand to be corrected. You would have to go through all the cases and work out in which ones averments got them over the line, effectively, and how much they recovered.

CHAIR—They certainly use them in the majority of convictions. I was interested, for instance, in the case we are taking evidence on this morning, the Tomson case. They still chose to use averments despite the fact that they had gone overseas to find evidence.

Mr Hudson—Which is one of the issues we have.

CHAIR—Which is one of the reasons why you are supposed to use averments.

Mr Hudson—If you cannot go overseas.

CHAIR—Yes.

Mr Hudson—That was the traditional use. Now the legislation is so loaded up in terms of obligations to retain documents, obligations to produce documents and penalties if you do not, with the July 1 changes from last year with the CMR legislation, we are in a very different environment. To then say we still need averments does not sit that well.

CHAIR—Would you like to detail the changes from 1 July.

Mr Hudson—By all means. This is the first stage of the trade modernisation legislation. My colleague Mr Law and I are appearing in different capacities before the Senate debates on that. There were changes that came in on 1 July. There were new strict liability penalties. Some sections which have not had strict liability were brought in with strict liability. They are sections 33, 243T and 113.

CHAIR—And they are in respect of?

Mr Hudson—Section 33 is dealing with goods under Customs' authority without approval. In other words, it is moving goods in bonded warehouses, for example, without approval of Customs.

Section 113 is loading or exporting goods without authority, which is putting stuff on a boat and setting off to China without getting the approval in place. Section 243T was the original administrative penalty. Errors or mis-statements to Customs resulting in a loss of duty or an incorrect drawback or refund was reworked into a strict liability offence. A new section 243U penalises errors in statements to Customs regardless of the effect of duty. So you can make an error in a statement to Customs. Even if it has no duty effect, you still get penalised for the fact that you are made an erroneous statement.

Mr MELHAM—What are the penalty units we are talking about?

Mr Hudson—We are running probably between 10 and 50 depending upon the severity of the matter. Within section 33 there are still some serious provisions for which you have to prove there is not strict liability. Matched up with the changes, there were new powers to Customs in terms of audit or the monitoring powers and their export examination powers, which were much broader than the previous ones. There was also the ability to issue infringement notices. There were provisions saying, 'We can come in and compel you to answer questions or produce documents.' That will give you some idea of the scope of the new powers that were given to Customs, including the obligation to keep a wider variety of commercial documents.

CHAIR—Have they upped the personnel to deal with those new powers?

Mr Hudson—I think they have been issued more budget for it.

Mr Law—I have no direct knowledge.

Mr Hudson—I think most of the budget has been allocated for the IT issues associated with CMR. But certainly their new powers are there. And Customs' emphasis, they say, is on compliance. It has moved away from trade facilitation, which for many years was the byword towards broader security and compliance. So it is a much more detailed examination of what goes on. In the context of that, one of the rationales for averment might fall away.

CHAIR—If we look at the case we were looking at this morning, there were 20 summonses issued. I think each of them is an averment. A cursory look says they are. It says, 'The prosecutor avers that' et cetera. If that averment power had not been there, would they have been able to bring the charges to test them? That is the question.

Mr Hudson—I think probably the only person who could answer that is the person who made the averment perhaps. Obviously averments make it slightly easier. Otherwise you have to bring the charge based on direct evidence or personal knowledge as opposed to averments.

CHAIR—In their case, they added two documents together and came up with a new figure. That is what was the real cost, and therefore you have understated the duty payable. They simply aver that. I suppose you can make that allegation, you can lay that as an information anyway, without it being an averment. But prima facie it stands.

Mr Law—People make allegations all the time which people have to answer. It seems to me that you do not need an averment power to make an allegation. You can make an allegation and come to the conclusion that A plus B equals C without having to aver it. Frankly, I cannot see

what difference it makes. The High Court, when they have spoken on averments, have said that what averments do is assist Customs in their evidentiary burden. They still have to satisfy the persuasive burden and persuade the court that the person is guilty.

All we say is that over time the ability to satisfy the persuasive burden by the prosecution has been unduly assisted by the use of averments. When averments first came into our law, in my opinion, they took a similar position to what we know today as agreed facts between the parties. We both agree that that person's name is John and that person's name is Susan. They reside together. He drives a red car and she drives a white car. They are issues that do not have to be litigated. Everyone agrees with various facts in an agreed facts situation.

My understanding of the history of averments is that the purpose of them was to save the court and the prosecutor time arguing about issues which everybody knew or ought to have known were the absolute truth. It does not go, in my submission, to people's intent and the res gestae, the remaining issues that surround the basic facts and whether this happened or that happened. In my submission, the bar rules put a very high duty on prosecutors to be sure that their case has a reasonable prospect of success before they prosecute anybody. It seems to me that an averment is a legitimate instrument in the legal sense for possibly short-circuiting the usual duties of a prosecutor.

CHAIR—Let us go to one of these summonses. The second averment is that the defendant caused the goods to be bought for a price and they were brought to Sydney by aircraft, which arrived on 16 July 1987, for the purposes of discharging them there and the goods were discharged there. That is a shortcut, if you like, to saying you do not have to prove that they were on that plane and that the plane did in fact land and those goods were discharged. You could say it could remain a useful—

Mr Hudson—As an averment to fact and for non-controversial issues.

CHAIR—Mr Rodda was making the point this morning that with regard to certain documentation it was agreed that the documents existed. It was what was meant that was at issue. So the averment here is:

> The defendant caused an export declaration to be produced to Thailand Customs together with an invoice from Steady Export Company for the said goods, which stated that the price paid for the goods was $1,593 whereas the price paid or to be paid was in excess of that amount.

Now that is where you get into conjecture. There was no doubt that the parties agreed that the invoice was indeed produced and it was for that amount. Where you get into disagreement is where Customs was averring that the price paid was higher than that. Because it is averred, prima facie that is the case. The obligation is then on the defendant to show it is not the case.

Mr Law—The High Court says that that is not necessarily true. But as a part of the reality of defending the persuasive arguments put by the prosecution, that is where you end up. That is where you end up.

Dr WASHER—One of the reasons that was brought in for averment was to reduce court time, to simplify things. I guess the question is: how many of these cases actually go to court? In other

words, if you catch me out, I am happy to pay the fine. Rightly or wrongly, it does not go to court. Would that not still be the bulk of these cases?

Mr Hudson—It is difficult for us to summarise. We can only speak from our own personal experiences. I have handled matters where Customs have averred things. It has made it difficult for clients because they are faced with a government instrumentality with all the powers it has to aver. It balances. What I would say on the issue of saving time and fact is that we refer to three reported cases in which the averment issue was put squarely before various supreme courts. There was extensive time taken up in going through lengthy and difficult averments to determine whether they were correctly made or not.

CHAIR—Whether they were fact or law.

Mr Hudson—Whether they were fact or law. Ultimately, there was a lot of time and expense taken up with those things. We have often seen—and I certainly in recent times have seen—a lot of averments where you have reported cases that rely solely on averments and go to this issue. And judges have said, 'Well, that's allowed and that's not,' or 'We've got to strike this one out altogether.' That certainly strikes at the issue of making it easier. We often see averments now which are summarised statements of claim by Customs at the end of which they say, 'And I hereby aver to the matters to which I am entitled to aver.' It is a bit of a scattergun approach.

Dr WASHER—I understand. What we are talking about is three cases.

Mr CADMAN—That is a political statement.

Dr WASHER—I do not know how many people Customs are catching, but I imagine it would be a considerable number. I suggest to you that if we put all of them before the courts—in the proceedings you say one took 10 years—I think we would be talking about cases of 20 to 30 years.

CHAIR—But they still have to go to court.

Dr WASHER—If you ping me for something, whatever. If I say I bought something and you say, 'No, it's worth more,' you then say, 'Look the fine on this is this.' I would not have to go to court if I agree I am pinged. I will pay it. Wouldn't that be a fine? It is only if I refused to pay it that I would have to go to court. Do I have to go to court to pay the fine?

Mr Hudson—I will give one example.

Dr WASHER—I genuinely do not know.

Mr Hudson—That is fine. I will give one example of multiple allegations of smuggling and undervaluing that were made of one of my clients. Ultimately, they said they averred certain facts and were able to produce evidence that those averments were incorrect. I previously invited him 18 months earlier to make the investigations, but he had chosen not to. So at the mediation process, ultimately the client said, 'This averment is quite strong, that averment is quite strong. I agree that I am prepared to accept responsibility for these six offences, effectively.' Then that has

to be endorsed by a court. You have to go before the court and accept. You hand it up and accept that responsibility and accept that fine.

Dr WASHER—But it would only take a very limited time to prepare a trial.

Mr Hudson—Absolutely.

Dr WASHER—The other thing I have some difficulty with is that I agree that the auditing technique and the money spent to travel et cetera is all there in the budget. But hypothetically, if you go overseas, some of these things would be very hard to prove or disprove. You are still stuck.

Mr Hudson—But it is equally hard for a defendant then.

Mr Law—Why should someone not just make an allegation rather than have the power of averment? Why should you? For example, imagine if a policeman pulled you over and said, 'As far as I am concerned, you were doing 200 kilometres an hour.' Your car will not do 120 kilometres per hour, but you cannot prove it. So you are guilty. That is the sort of situation we are faced with. In my submission, it is quite possible, and I would say not necessarily unusual, that people make averments when they do not know what they do not know. They have no idea, quite possibly, what happens in other countries regarding the trading principles et cetera. I am running a case at the moment where the allegation is that the Chinese government has entered into a conspiracy to defraud the Australian government. That might be right, but, my goodness. It is all right for you to laugh, but I can assure you my client is not laughing.

Dr WASHER—We should not laugh, but it is probably right. When I was in China just recently, I openly admitted that about Russia in terms of their corruption. It was at a very high level.

Mr Law—I do not want you giving evidence for Customs.

Mr Hudson—I want to make one point. A lot of the averments are in prosecutions against people who perhaps do not have access to, if you like, relatively sophisticated legal advice. You have a lot of people faced with an averment. They get preliminary advice—

Mr CADMAN—That is almost intimidation.

Mr Hudson—I do not think it is necessarily deliberate, but it is one of the reasons why perhaps averments—

Mr CADMAN—I wonder whether you can demonstrate that in any way. What you are saying is that a person with an inability to fully defend themselves is more likely to be confronted with averments than assertions.

Mr MELHAM—He was not saying that.

Mr CADMAN—Let me test it, because that is what I thought he said.

Mr MELHAM—He was not saying that.

Mr Hudson—No, I was not saying that. What I was saying was that in many cases people who are prosecuted for these types of offences may not necessarily have access to legal advice or sophisticated legal advice, or they might find themselves with statements from government—

Mr CADMAN—I cannot see that what you are saying is different.

Mr MELHAM—There is a big difference.

Mr CADMAN—How is my assertion different from your assertion?

Mr Hudson—I think the assertion was that it is being deliberately used as a mechanism on unrepresented people, and it does not happen that way.

Mr CADMAN—Well, what did you say, then?

Mr Hudson—I was not saying that it was more likely to happen that way. What I was endeavouring to say, and clearly not terribly well, was that in a number of cases averments are in prosecutions made against people who may not necessarily have access, not that it is used against them deliberately. It is a standard tactic used in a number of prosecutions. People who are faced with those prosecutions may not have that access to legal advice. So they are, I think, unfairly disadvantaged because they do not have the ability to deal with an averment, which to them looks like the government is saying, 'You have done this wrong,' or 'This is what we say is the statement. You have to disprove it.'

CHAIR—And that effectively is what they have to do.

Mr Hudson—In essence. We could talk forever about the evidential burden. A number of people faced with these averments from government go to a lawyer. The lawyer says, 'Well, the government is saying you have done this. You're going to have to disprove it or you're going to have to lead evidence to disprove it.' That makes it very difficult, I would think, for a lot of defendants.

CHAIR—That is precisely what happened in Mr Tomson's case.

Mr Hudson—Mr Tomson had access to some very expert legal advice.

CHAIR—He did, but they did not expect him to.

Mr CADMAN—Had those averments been made before he arrived in court?

CHAIR—Yes. These were sworn on 7 September 1992. He did not go to court until 1993. The event took place in 1987. The gap in this case, is that unusual for customs prosecutions?

Mr Law—You are asking for a statistical answer which, with respect, I could not give. There is such a broad kaleidoscope of alleged customs offences that there would be good reasons why some matters would take longer than others. I cannot say.

CHAIR—But this is bizarre. In 1987 his goods were seized, and again in 1988. You have a Customs minute dated 1987 saying, 'We don't have enough to go on. We think he is a guilty sort of person, so here are your options.' They do not have enough evidence. Then they find a document where there is a confusion over FOB or CIF. On 1 July, the laws could be fatal.

Mr Hudson—Well, it could be fatal. You are talking about different penalties altogether. The new legislation, the 1 July legislation, is not technically a customs prosecution. It is a penalty, which is separate.

CHAIR—It is just strict liability?

Mr Hudson—That is right. Such prosecutions tend to be for smuggling under section 233, and misstatements under 234.

CHAIR—That is what they have here.

Mr Hudson—Yes, that is correct.

Dr WASHER—That is why an averment is actually made. You just get a fine and go to court. You still do not want averments used?

CHAIR—No. It is strict liability. It is like an on-the-spot fine.

Mr Hudson—With the new strict liability penalties, you only have a limited amount of defences available under the Commonwealth criminal code: someone else did it, the dog ate my homework or the equivalent. So the very limited ones are duress, intoxication—

Dr WASHER—Mistaken fact.

Mr Hudson—Mistaken fact is a classic one, of course. But often the delays occur because of the delays in actually going back and auditing records.

CHAIR—Not in this case. It does not make any sense.

Mr Hudson—I cannot speak on that.

CHAIR—In 1990, they offered him his goods back for $240,000 after having seized them in 1987-88. He said no because they were of no use any more. In 1992 in September, they averred on 20 charges. In Customs' evidence this morning, they started off looking at 84 shipments. They brought it down to 18 shipments. They eventually averred with regard to five.

Mr Hudson—I have not had the benefit of a detailed analysis of Mr Tomson's case.

Mr MELHAM—I think you are better off staying out of it.

Mr Hudson—I would like to.

Mr MELHAM—In your submission at the bottom of page 12, you talk about technical legal protections to the averment procedure in section 255 of the Customs Act. Is that subsections 3 and 4?

Mr Hudson—That is correct, which does not affect the onus of proof or the evidential burden.

Mr MELHAM—It does not affect the intent of the defendant?

Mr Hudson—No.

Mr MELHAM—It specifically says proceedings for an indictable offence or an offence directly punishable by imprisonment.

Mr Hudson—That is correct. So it could not be used in those circumstances. But not many of the prosecutions these days actually have punishment by penal offence any more.

CHAIR—I am just looking at some documents that we got from Customs that I would like to ask you about. I cannot disclose them because they have names and so on, so I will not do that. But one lot relates to community protection matters, so they are things like prohibited therapeutic goods, that is, anabolic steroids, ephedrine, live spiders sent through the post, assorted parts for paintball equipment, ephedrine and other prohibited therapeutic goods, parts of a Stenmark II submachine gun.

Mr Hudson—Stuff you would rather not have in the community.

CHAIR—Indeed. Now in these cases, averment was used, except in the case of the live spiders, the wildlife. In all these cases they have used averments, but they did not use it in a Mossberg pump action 12-gauge shotgun. Certainly in the vast majority of all those cases they used an averment. The number of convictions I will add up. The penalties seem to be basically money, but there is imprisonment for some.

Mr Hudson—Those are the prohibited import provisions.

Mr MELHAM—That would not have been used in that.

Mr Hudson—No. It cannot be because it is a conviction. He goes to jail. They appear to be prosecutions for importing contrary to the prohibited import provisions, which are a bit different from the smuggling and evasion of duty issues.

CHAIR—I am reading from this report. A magistrates court case involving six flick knives. There was a guilty plea, averment was used, there was a fine of $300. The other sentences awarded were under 19B of the Crimes Act. A nil conviction was recorded with a good behaviour bond of three months on a $100 bond.

Mr MELHAM—How do we know averment was used in that case?

CHAIR—Because it has a column 'Averment Used' and it has 'yes' or 'not applicable'.

Mr Hudson—Averments are available under the Commonwealth crimes legislation, but that is outside the Customs Act.

Mr MELHAM—So it is outside Customs.

Mr Hudson—There is a provision. There is reference in one of the submissions—it might have been the Attorney-General's submission—to the availability of averments in the Commonwealth Criminal Code.

Mr Law—But if someone comes through the airport and they have six flick knives on their persons, you allege that they have six flick knives. The officer who took the six flick knives gives the evidence and is cross-examined on it. That is the way our system is supposed to work. I acknowledge—

Mr Hudson—In the Attorney-General's Department submission at paragraph 10, section 13.6 refers to averments of the criminal code which apply to all Commonwealth criminal offences whether in the code or otherwise. Section 13.6 provides that a law that allows the prosecution to make an averment is taken not to allow the prosecution to aver any fault element of an offence or to make an averment in prosecuting an offence that is directly punishment by imprisonment.

CHAIR—Say that last bit again.

Mr Hudson—Similarly to the Customs Act, it is not to allow the prosecution to make an averment in prosecuting for an offence that is directly punishable by imprisonment. In the cases before you—we are only speculating here, John—

Mr Law—Absolutely.

Mr Hudson—the averment may have been as to stats associated with the importation, such as a person coming in on an aircraft. It certainly could not have been used in respect of a file document.

CHAIR—So you are talking about the averment in the second paragraph about the aircraft arriving and so on?

Mr Law—That is right.

CHAIR—So if a case were to be made to keep an averment, you could certainly make a case that it ought to be restricted?

Mr Law—That is exactly the point we are making.

Mr Hudson—That is our default submission, if you like, consistent with what the Australian Law Reform Commission has recommended on at least two occasions now.

Mr MELHAM—So that is the guideline you would use, the Australian Law Reform Commission?

Mr Hudson—Well, for a start, from my own perspective and from our submission, as you will see, from the customs committee we have recommended that that criteria be adopted, which would allow a judge to disallow an averment. We would like to beef that up, so to speak, mandating guidelines in circumstances in which averments can be used. Importantly, at the end of it, it would be to have provisions that say that if people recklessly or deliberately aver to things which they know not to be true, there would be penalties associated with it.

Mr CADMAN—Should that be part of court law or part of the legislation?

Mr Hudson—I would say it should be part of the legislation, one way or another.

Mr CADMAN—It would cover tax, crime law, customs, everything?

Mr Hudson—Absolutely. Certainly in respect of customs, I think that is what it should be. For averments generally, I think there should be provisions. If they are to be retained under this legislation or other legislation, our submission is that they be retained subject to the materials we have recommended here. That includes penalties and offences for improper averment.

Mr Law—I think it is important to notice that the averment provision in customs is a specific provision within the act whereas the provisions that Andrew was talking about in the Attorney-General's submission are to do with the criminal code and refer to all criminal prosecutions, remembering the High Court in the Labrador Liquor matter is still out on whether or not these customs prosecutions are in fact criminal in nature.

Mr MELHAM—But you say that even if they find they are not criminal in nature, you would still wish to pursue?

Mr Hudson—Given the ramifications which follow from a customs prosecution. The nature of them is such that even if it was not criminal, they are sufficiently serious from a civil standpoint. I think that is recognised. Even in all the judgments which talk about it being civil, they still apply the Briggenshaw test, which is the more serious it is—

CHAIR—The more serious the penalty.

Mr Hudson—You are getting pretty close anyway.

CHAIR—What was the lovely case about paternity, where it had to be proven beyond reasonable doubt because of the consequences that flowed? That is before we had DNA testing. What was the name of the case?

Mr MELHAM—Defending fathers is always difficult.

CHAIR—That was the standard, despite the fact that it was a civil action.

Mr Law—Yes, because the consequences are so dire.

CHAIR—That is right, so they apply the criminal standards. I note Customs' correspondence to us—we are just counting up the number of prosecutions involved—says the worksheets

contain all prosecution activity commenced by Customs. Criminal is the DPP, which is the way they are defining it. Civil is AGS prosecutions under non-customs legislation and includes those cases where Customs was successful or otherwise. They include criminal matters handled by the DPP—that is, Crimes Act charges. It says, 'Please note that averments are not used in criminal matters or for the prosecutions under non-customs legislation.' Well, that is not entirely true.

Mr Hudson—Well, averments are available, but they are limited in the same way as they are limited under the Customs Act. So they can aver under the Commonwealth crimes legislation and refer to the provisions, but they cannot use the averment again—

CHAIR—To say you are guilty.

Mr Hudson—to say you are guilty.

CHAIR—But they can aver the facts nonetheless. To say they cannot use it is not true.

Mr Hudson—And they aver as to Crimes Act prosecutions I have defended, where they are prosecuting Crimes Act as well as Customs Act at the same time.

Mr MELHAM—How big a problem is this in the industry, looking from a public policy point of view? I am in the opposition, so I have no sway with the government. I am just interested in how big an issue it really is. How widespread is it? What will it really mean to Customs with its revenues? It has to affect them, hasn't it?

Mr Law—My understanding is that in the scheme of things Customs' revenue is not all that significant in itself anyway any more. The majority of the revenue administered by Customs is the GST. I do not seek to diminish the revenues of Customs or the importance of them at all. Obviously they are important and obviously people have a legal obligation to pay. But in the majority of these prosecutions that the Chair has referred to, the people are going to be found guilty whether you have averments or not.

Mr Hudson—Because ultimately you still have the evidentiary burden to satisfy.

Mr MELHAM—But is not that an argument against your argument – that if the majority of them are going to be found guilty anyway? What we have here is a shortening of the facts, so to speak. I am being a bit of a devil's advocate here.

Mr Law—I think it is a sensible question. I do not see much, if any, practical difference in making an allegation that the person arrived on ticket number such and such and such and such, XBA or QF11 or whatever flight it was and carried on their person six flick knives, which were found by officer ABC, who is here in court, gives evidence and is there to be cross-examined. You cannot cross-examine someone on an averment.

Mr Hudson—I think the difficulty we have with the averment—

CHAIR—Say that again.

Mr Law—I do not believe you can cross-examine someone on an averment.

Mr MELHAM—According to section 255, you can.

Mr Hudson—You can cross-examine.

Mr Law—It is dangerous to try and keep all the legislation in your head.

Mr Hudson—The issue we have with the averment goes beyond that. I think the issue is that it was there for probably a valid reason over 100 years ago. Given the respective positions of prosecutor and defendant, given the powers which the prosecutors now have, given the obligations, and given the recorded instances in which averment has been proved to have been incorrectly or improperly used, we have reported cases here in which averments have been knocked down on the grounds that, 'You shouldn't have averred in this way. It was incorrectly done.'

Mr MELHAM—Well, I am interested as to whether that requires getting rid of averment or whether it requires a practice and a code to be developed. They are two different things.

Mr Hudson—I understand that.

Mr MELHAM—I can see the advantages of averment in some instances, quite frankly.

Dr WASHER—I think in the second fallback, you say that if someone avers and falsely so with intent, then they still have the right—

CHAIR—That is perjury.

Mr MELHAM—Sure. But I am looking at it a bit more than that. I am worried about –

CHAIR—But at the moment we do not know whether they are guilty of perjury, do we?

Mr Law—No-one knows until it is tested.

Mr Hudson—Until it is tested. If you go to court and, for example, they are cross-examined on what they have said—

Mr MELHAM—What I am interested in is some examples where you say they improperly averred. How do we flesh that out so there is a code as to how averment is used.

Mr Hudson—In several reported cases, which we have drawn your attention to in the submission, there has been a lengthy averment. Ultimately, for example, in CEO of Customs v. Amron, which is a Victorian Supreme Court case, they went through a lengthy averment by Customs. They had to work out which ones were averments as to intention and which ones were as to fact. They had to take them out and deal with them. It comes back to, in all the submissions I think we refer to it as a 1930s High Court case with the Crown v. Hush in which they talked about a very big averment. They said they have to be pleaded with precision. I think that is probably the problem we are facing now. Often it seems to have been used as a fallback, as a general approach rather than—

CHAIR—Specifically.

Mr Hudson—Rather than going through and investigating each and every element.

Mr MELHAM—That is what we are interested in pursuing.

Mr Hudson—So the fallback is to the extent that we think it is still warranted with the averment power, we have talked about the development of guidelines. We have talked about powers for the courts to disallow it in certain circumstances. We have also talked about penalties for those who aver to things which they know not to be the case. I think that is consistent with most prosecution type issues.

Mr MELHAM—I apologise. I have to be on duty shortly. I have some other commitments in between. Thanks for your evidence this afternoon.

CHAIR—I am going through these cases. The vast majority of the pleas are guilty pleas. There are 38 offenders—and these are revenue matters—and about 205 convictions because there were multiple charges. There were eight who pleaded not guilty. That resulted in only two of them getting off. That is a lot better than the average in most criminal cases, where I think the numbers are 67 per cent of people plead guilty. Of the remainder, you have a fifty-fifty chance of getting off.

Mr Hudson—I think perhaps they pick their targets fairly well. There is reference again in the various submissions to the sort of criteria which are considered in the prosecutorial guidelines.

CHAIR—But if they are getting six out of eight, which is a pretty good batting average—

Mr Hudson—That is a very good strike rate. That is excellent.

CHAIR—then the revenue implications are probably not going to be as dramatic as you might think. Although on revenue matters, for instance, there is a particular person who pleaded guilty with a Commonwealth Crimes Act prosecution, the averment was not considered applicable, so not used. The fine was $974,276 and he got five years and six months with three in a non-parole period, and that was for diesel fuel offences.

Mr Hudson—It would be intriguing to see whether that was at a time when the Taxation Office was handling the administration of excise as opposed to Customs. Of course, the tax office now administers the diesel fuel and excise type issues.

CHAIR—We know why that is. We think they do a better job.

Dr WASHER—Forgive me for not being a lawyer. For simplicity, to reiterate, averments were used to save court time?

Mr Hudson—That is right.

Dr WASHER—That was one of the reasons.

CHAIR—No.

Mr Hudson—Not to save court time. It was to take out the non-controversial aspects. It might have that impact.

CHAIR—It was to allow things that could not be proven because it was too hard. You had to take a sailing ship to get over there to take the evidence.

Dr WASHER—But literally the bulk of them still would mean that I allege that you understated what you brought in. I go to court. There is a fine imposed. I pay the fine. That is it. In the bulk of matters, I imagine that would happen, unless there was a hell of a big fine or I felt really cheated. That would be the end of it. I would get off with a fine. Would that not be the case? We can go into proceedings—

CHAIR—It can then be used as the basis for criminal prosecutions.

Dr WASHER—It cannot go to court proceedings, can it?

Mr Hudson—My own practical experience is all I can talk from. For people who have been averred against or where it is alleged that they have defrauded the revenue, in the majority of cases they will fight it. They will fight it regardless because it might have a whole variety of impacts on their ability to have a company directorship, for example, their ability to conduct business if it is on their record that they or their company have been found guilty of defrauding the revenue. So we are talking about sections 233 and 234, being the serious offences. I think occasionally people might make a commercial decision to plead to certain offences because it is expensive. It happens in all cases. People make commercial decisions to plead to certain things. But in the majority of cases that I have dealt with—John might want to talk about his experience—if people are alleged to have defrauded the revenue and have lied and cheated and the whole bit, they will dig in to the full extent they can.

Mr Law—I think that is right. I think when people are charged with white collar crime, it is far removed from the person who is caught coming through the airport with live spiders or a pocket full of flick knives. They are a totally different. They are people with different lives. The people who run their business, they do this and they do that. Maybe they push the envelope up to the limit of the legislation as they understand it in good faith. Usually those people will fight tooth and nail.

CHAIR—How many cases would you have a year where they put a not guilty plea?

Mr Hudson—In all the ones I have done, they have all been not guilty. It is probably two or three a year for the last three or four years. It is where prosecutions have been issued under sections 233 and 234. That is not under the other penalty provisions, such as smuggling and the deliberate misstatement type provisions.

CHAIR—So these would be called revenue cases?

Mr Hudson—They would be, because you are recovering the underpaid revenue or the mispaid revenue as opposed to the administrative penalty type provisions.

CHAIR—How many a year?

Mr Hudson—Probably two or three a year.

CHAIR—And do you do well?

Mr Hudson—Well enough, I think. I am still getting them.

CHAIR—So you get a few off?

Mr Hudson—Off is probably—

CHAIR—You are successfully—

Mr Hudson—I am successfully defending them as opposed to getting them off.

CHAIR—Why have we only got two from 2001 and 2002? Are yours the only two successful cases?

Mr Hudson—I would not have thought so. That is my recollection.

Mr Law—My hit rate is over 90 per cent across all jurisdictions, so maybe I am not typical, I do not know. In all humility, it might be just that the people come to me who should be getting off. As with Andrew, we do not seek to get people off.

CHAIR—No. You seek to—

Mr Law—I tell people all the time, 'If you're guilty, don't lie to me. Put your hand up. We'll plead in mitigation. I do that as a matter of practice. Swear on the Bible. That is what we do.' I think there is such a huge difference between people who are professional traders dealing with a variety of people in a lot of different countries with different procedures. It does not mean because the exporter is cheating on his tax coming out of, say, Singapore, that the importer here is misdeclaring on a separate set of invoices what the value of the goods is. That is a very difficult concept for a diligent customs officer to come to grips with. I applaud their attention to detail. Just because someone in a foreign jurisdiction is cheating on their revenue does not mean that someone in Australia is cheating on Australian revenue. It is very, very difficult to know as an advocate whether or not your client is telling you the truth. I have to say in the more than 30 years I have been involved in this jurisdiction, most people take a prosecution against them for, say, valuation, very, very personally. There are those who will put their hand up straight away.

CHAIR—Would the majority be prosecutions under the Customs Act or under the Crimes Act?

Mr Law—Mostly I have done Crimes Act.

Mr Hudson—Or a mixture.

Mr Law—Or a mixture.

CHAIR—But the Crimes Act would usually be involved?

Mr Law—Yes.

Mr CADMAN—Just listening to you talk about the changing role of averments, it seems to me that I try to graduate the statements. I have started with the last level, if you like, agreed facts—

Mr Law—Sorry, I missed what you said.

Mr CADMAN—I have tried to graduate statements before the court and in levels of strength. Agreed facts are at the bottom level. Previously averments coming next, then assertions and accusations. It seems to me that the process you have described has changed in character and agreed facts are now at the bottom, with then assertions, averments and accusations. It seems to me that the role of an assertion and averment has switched in that an assertion can be refuted and made easily. An averment has greater strength but is not the full strength of an accusation. That is a change in character, as you have described it, of what an averment was.

Mr Law—I would have thought, with respect, that an averment is much stronger than an accusation because it carries the force of the state saying, 'This is what happened.' To me, it is very close to an accusation.

Mr CADMAN—Is that right? They say it came into existence as agreed facts.

CHAIR—No.

Mr Law—No. What I am saying is that what we have as a matter of practice today in several jurisdictions is we have agreed facts. Both parties will say, 'Look, this and that and that happened, but the results are different.' We are arguing about the results or the way the law is to be applied to the facts.

Mr CADMAN—You have said, though, that that is the way the averment was introduced.

CHAIR—No.

Mr Law—No. What I meant to say, and I apologise if I misled you, was that the same as agreed facts in a civil jurisdiction today are not contentious, that was the intention of averments in the first place—to save, as the chair has said, people going on the seas to try to gather evidence. And the example given by Mr Wollaston was that if there was duty allegedly evaded on one barrel out of 144, for example, proving it was on that barrel that the duty was defrauded would be a nightmare. I cannot speak for Andrew, but even myself I would have some sympathy for Customs trying to prove that.

Mr Hudson—Absolutely.

CHAIR—What we are basically getting to is saying that there could well be a case made out to retain averment on things like the Wollaston example or where the plane arrived and it was on it, as distinct from the need for the prosecution to collect its evidence in a proper way and prove its allegation.

Mr Law—I think it is very dangerous for the prosecution to aver what happened between a person from this jurisdiction and a person in a foreign jurisdiction as a matter of fact. That is very, very difficult. I have seen people in the textile, clothing and footwear industry have their valuation challenged for the reason that they do not run their business on the same way of selecting suppliers and having goods manufactured as Coles Myer when they are dealing with cottage industry.

CHAIR—That is the evidence we were hearing this morning about Tomson.

Mr Law—I am not making any reference to the Tomson case whatsoever. This is my own first-hand experience. People dealing with cottage industries et cetera want to be paid in cash. That is why you transfer cash to the other jurisdiction so that the person can be paid. The person with the sewing machine or the hand that moves as quickly as the sewing machine does not have a bank account. They do not have a bank to put it in. You have to move cash. It is not fraud to move cash to pay someone who is your creditor.

CHAIR—But it is then open for Customs to aver that, let's say $50,000 was moved offshore and you only bought $30,000 worth of goods. They say, 'Really you paid $50,000 and we aver that you pay $50,000.'

Mr Law—Yes. A similar situation would be where, for example, you were running other business operations in another country where people had to be paid in cash. They had to be paid in local currency. It is unreasonable, in my submission, to suggest that because someone moves money to another country for use in their wider business interests it should be averred or even alleged that that value must attract to imported goods. It is not necessarily anything to do whatsoever with the imported goods. If you are paying wages to people overseas for activities not related to the imported goods, it does not form part of the customs value.

CHAIR—That is right. It does not apply. On the question of these documents I have from Customs, would somebody move that the Australian Customs Service prosecution report 1 July 2001 to 30 June 2002 on revenue matters and similarly community protection matters together with the accompanying email be received as confidential exhibits to the inquiry?

Dr WASHER—So moved.

CHAIR—Thank you. I might say that, having totalled up the amount of fines paid, it is around $5 million we are talking about.

Dr WASHER—I want to ask one quick question. In option 2, basically you indicated that you would like to see the ability for someone who had made a false statement who happened to be in the office for Customs to be tried for perjury or challenged for perjury if that was the case. Why can't we do that now? Why would they have any protection against that?

Mr Hudson—Because they are not swearing to it. They are merely averring to it.

CHAIR—That is the point.

Dr WASHER—I do not mean to interrupt. But if you were a bad dude in Customs, you could use this as a very powerful weapon and not be challenged on it? Is that what you are saying?

Mr Hudson—Coming from a Customs background myself, that is difficult.

Dr WASHER—I am not saying there is any intention.

Mr Hudson—Yes, there seems to be a lack of accountability for averments. I guess that is what we are saying. They are being used very broadly and probably often in circumstances where it appears to be inappropriate. There seems to be anecdotal evidence that averments are being made as to matters which people believe to be other than what they are saying in the averment for whatever reason. The averments effectively go into evidence. They get introduced as part of the evidence. But at the moment there is no accountability for that.

CHAIR—I am using the Tomson case simply because we took evidence this morning. We had evidence given that Mr Grausam was led in evidence about certain information basically agreed to, if my memory serves me—someone will correct me if I am wrong—but evidence was not led about the documents which were averred to. By not having to give evidence about the documents that were averred to, there is no question of perjury.

Mr Hudson—No, that is right.

CHAIR—But if you have averred it and then are you called to give evidence and you give that evidence, you are then sworn and perjury could flow if that were the case.

Mr Hudson—Correct.

CHAIR—So averments are totally different from other sworn statements in that no culpability can be laid on the person making the averment. That is the big distinction, isn't it?

Mr Hudson—And I think that is the problem that arises generally.

CHAIR—We need to finish now because someone else has booked the room.

Resolved (on motion by **Mr Cadman**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

CHAIR—I now declare this hearing closed.

Committee adjourned at 5.21 p.m.