



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

**HOUSE OF  
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL  
AFFAIRS

**Reference: Averment provisions in customs legislation**

THURSDAY, 24 JULY 2003

SYDNEY

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**HOUSE OF REPRESENTATIVES**  
**STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

**Thursday, 24 July 2003**

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

**Members in attendance:** Mrs Bronwyn Bishop, Mr Cadman and Mr Murphy

**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.

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**Committee met at 9.10 a.m.**

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

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

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

**CHAIR**—I declare open this public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into averment provisions in Australian customs legislation. The committee resolved to conduct this inquiry following a review of the Australian Customs Service annual report 2001-02. Last month the committee took evidence in Canberra from a number of witnesses who have had experience with averment provisions, as Commonwealth officers, legal practitioners and defendants. Today we are taking further evidence from some of these witnesses. The committee has received additional submissions to the inquiry. Can I ask a member to move that the following submission and supplementary submissions be accepted as evidence into the inquiry into averment provisions in the Australian customs legislation and be authorised for publication: submission No. 6 from Mr Noel Clifford Balzary and a supplementary submission 4.2 and attachments from the Australian Customs Service.

**Mr MURPHY**—I so move.

**Mr CADMAN**—I second the motion.

**CHAIR**—Thank you. It is so ordered. Do any of the witnesses have any further comments to make on the capacity in which they appear?

**Mr Rodda**—I appear in my own capacity but as adviser for Mr Tomson.

**CHAIR**—The committee has received a submission and a number of supplementary submissions from Mr Rodda, and we have authorised those for publication. I would ask whether all of you or any of you would like to make a further opening statement this morning.

**Mr Rodda**—I would like to make a couple of comments about matters that arose from the Customs submission at the previous hearing. Firstly, the *60 Minutes* program referred to me at one point as Mr Tomson's lawyer. That is not correct. I am a lawyer, but I am not Mr Tomson's lawyer. The firm of Barwick Boitano are Mr Tomson's solicitors, and I do not act in that capacity. I am a lawyer, however. I am admitted to practise as a barrister in New South Wales. I do not have a practising certificate, though, for the simple reason that I have never applied for one. For the past 25 years my advocacy experience has been limited to resolution of disputes, as to the rate or amount of duty payable—disputes with the Customs department. The body that is charged with jurisdiction over those matters is the Administrative Appeals Tribunal, and I do not require a practising certificate to appear in that jurisdiction. Accordingly, I have not applied for one.

The only other observation I wish to make arising from the previous hearing is that Mr Bellew's report was presented to me. In going through it, I make the observation that I have not

seen the terms of reference for that inquiry that he carried out, but I did notice in going through his report that there is no reference anywhere to sections B, C and D of my submission to this inquiry, which are the sections dealing with issues of fact.

**CHAIR**—Was that the Bellew report that was given to us at the conclusion of the last hearing?

**Mr Rodda**—That is correct.

**CHAIR**—I think the statement was made previously that you did not supply any information to Mr Bellew for him to test what you were saying.

**Mr Rodda**—That is true. I did not do so because I have had previous experience with Customs conducting investigations into allegations of wrongdoing by its own officers—Mr Cadman may recall the hot stamping machines case, which involved similar allegations. Customs conducted an inquiry into its own conduct. It decided that it had not done anything wrong although it may have technically breached a reporting requirement to parliament. But in putting together its terms of reference it completely omitted any reference to the fact that the principal allegation I made was that information that had been given to the minister in support of a proposal to amend the tariff was completely and utterly false. A report was tabled in the Senate that omitted any reference to that fact. A subsequent statutory declaration sworn by me gave conclusive proof of the fact that the information given to the minister was false. The matter was referred to the Director of Public Prosecutions, who found that the information was in fact false and that the officers who conveyed it had made an unintentional error. I was not convinced by that but, anyway, the matter was left to rest there.

**CHAIR**—Are you saying that your experience with that case made you decide not to answer the questions asked of you in an internal inquiry that you wanted some transparency about? Or am I putting words in your mouth?

**Mr Rodda**—No, you are not, Madam Chair; that is exactly my response. I was of the view that I could not rely on Customs to be objective in investigating allegations of wrongdoing against its own officers. I did not think it was appropriate for Customs to be its own judge and jury. I might add that it is not as if there was no information in my submission itself—which Customs has had since February 2000, I think—that did not indicate that there were signposts. Perhaps I will mention very briefly some of the things I am referring to. For example, at paragraph D.1.11 on page 38 of my submission to this inquiry, I made the observation that, in relation to a memo of Mr Gausam:

Mr Gausam's memo wrongly claims "*we have documentary evidence of two payments for the one shipment*". That claim is false and without substance.

That is very plainly a specific allegation about the details. I have referred to the specific memo. Nothing was said in Mr Bellew's report in response to that. Further on in my submission, at paragraph D.3.1, I have set out the preamble to the transaction between Mr Tomson and Gold Vincent and Co. I pointed out that Gold Vincent acted as Mr Tomson's buying agent. I have set out some details of the transaction. There has been no response to anything I have said there. In



paragraph D.6.14, I referred to a memorandum written by Mr Grausam, who made the observation:

*...“because Vilaysack was the one who supplied the information that was shown in the various documents I believe it reasonable to consider the lower value invoices produced to Australian Customs to be unreliable and the documents produced to the Hong Kong authorities to represent the true value of the goods as there would be no advantage in supplying them with false documents”.*

I go on to make the observation:

Mr Grausam ignores the fact that the declared FOB values for some of the goods shown in the Hong Kong export documents were actually lower than the prices shown in the invoice presented to the ACS.

I went on to state that he also ignored certain other facts.

In my statement I have indicated very clearly what some of the areas of concern are. I do not think you need to be a bloodhound to understand that they are very clear and very specific allegations and they are properly documented. I should add that all of the material that I am relying on for the purposes of the allegations I have made is taken from the documents we obtained under the discovery order in the proceedings against Mr Tomson during his trial. Since these are Customs documents, presumably they must be expected to have some knowledge of what is in them.

**CHAIR**—So what you are saying is that, for all the questions that were asked of you in relation to Mr Bellew’s investigation, the answers—the information—had been supplied to Customs in the submission that you had made to them.

**Mr Rodda**—Yes. The material that I am relying on is from their own files so all that they really had to do if they wanted to properly investigate the allegations that I made was read their own files.

**CHAIR**—But you had made a submission of the sort of material you have given to us to Customs?

**Mr Rodda**—Yes. They have had a copy of that since February 2000.

**CHAIR**—So they have had a copy of all the information that we have since February 2000?

**Mr Rodda**—That is my understanding of the situation, yes. The submission that was presented to this inquiry is basically just an updated version of the one that was given to Customs in February 2000.

**CHAIR**—Having gone through the report now that you have had access to it, you are saying that no reference is made to all that material that you supplied. Is that the case?

**Mr Rodda**—Correct, yes. What the report does is simply refer specifically to allegations but it does not seek to link any of the allegations to any of the material that I supplied in sections B,

C and D to support the allegations. The allegations seem to be treated in a vacuum without reference to any of the factual material that supports them.

**CHAIR**—Did you ever write back to Customs and say that you had received their request for information but basically they had it all?

**Mr Rodda**—Mr Barwick did that, I understand, in a letter in September which Customs disputes ever having received. However, I did write to the minister and told him what I had relied on for the purposes of those allegations.

**CHAIR**—I know very well how letters to ministers are dealt with. They go straight to the department for the department to write the answer. They then come back to the minister—and if the minister is a bit like me it often gets the blue pencil. That means the department would have seen your letter.

**Mr Rodda**—Yes, I would assume that to be the case.

**CHAIR**—Even if they did not see Mr Barwick's letter, they would have seen your letter because it would have gone from the minister's office to the department before it came back for signature.

**Mr Rodda**—Yes.

**CHAIR**—He did reply to your letter, I take it?

**Mr Rodda**—No. I did not receive a reply. I wrote to the minister—

**CHAIR**—Who was the minister at the time?

**Mr Rodda**—Senator Ellison. But what happened was that I had organised an informal meeting with the minister to let him know what this case was all about. He was busy at the time I arrived so instead I spoke to Matthias Cormann, who was his Customs adviser at the time. I explained to Mr Cormann what it was about and then at his suggestion wrote to the minister a couple of days later giving an outline of what the case was and what all the documents were that I had relied on for the purposes of the submission. That submission had initially gone to the Ombudsman but the Ombudsman requested I also send it to Customs. Customs had the submission. Then I followed up later with the letter to the minister explaining what the material was that I relied on for the purposes of that submission.

**CHAIR**—The minister may well have considered that that was answering the department's queries and that is why there was no reply.

**Mr Rodda**—Yes.

**CHAIR**—I note that we have also a submission from Mr Clifford Balzary, which we have just received and authorised for publication. Mr Balzary is an ex-Customs officer with 37 years experience in valuation; tariff preference and dumping in subsidy areas; and Customs. He appeared as a witness at the request of Mr Ian Rodda for the defence in the Peter Tomson case to

provide information about the importing activities of Mr Tomson. In that case, Mr Balzary's evidence primarily concerned the cost and price of apparel available in Asia, which was quite important. To recap from memory, the prosecution called a witness who gave evidence that the prices were too low. He was a person who dealt with David Jones or other big firms that have higher class merchandise. You brought evidence that Mr Tomson was bringing in much lower grade merchandise and that it would in turn be sold into market type sales areas in Australia. Is that a fair recollection?

**Mr Rodda**—Yes. I might just mention that the purpose of the evidence of Mr Prelea, who was called by Customs and who was the witness you just referred to, was to explain to the court that the cost of manufacture of the various goods imported by Mr Tomson was higher than the prices paid. The Customs case was put forward on the supposition that you cannot purchase goods for a price lower than the cost of manufacture.

**CHAIR**—Really.

**Mr Rodda**—That was the Customs case in essence and that was the purpose of Mr Prelea's evidence.

**CHAIR**—There was no allegation of dumping, was there?

**Mr Rodda**—No, although that is plainly what was happening. The goods were purchased at dumped prices, but dumping is not illegal.

**CHAIR**—There was no way in the world that Mr Tomson's product was going into a store such as David Jones, Grace Bros or any of those outlets.

**Mr Rodda**—No.

**CHAIR**—Your outlets were markets?

**Mr K. Tomson**—That is correct.

**CHAIR**—Such as?

**Mr K. Tomson**—Basically markets, and mainly towards Asian local markets. Our main market is Asian people.

**CHAIR**—Selling to Asian people?

**Mr K. Tomson**—That is correct.

**CHAIR**—Where would those markets be situated?

**Mr K. Tomson**—We had markets and shops. We had shops in Cabramatta, Bankstown and Marrickville, and the Fairfield markets. They were basically in those local areas.

**CHAIR**—Give me an example of the cost of skirts, tops, frocks or pants that you bring in?

**Mr K. Tomson**—Retail?

**CHAIR**—Yes, what were your retail prices?

**Mr K. Tomson**—At that time I think anywhere from \$19 to \$29. At that time I recall jeans being sold for about \$95 in the shops; JJs, Levis or something like that were being sold for \$100. We were selling them for \$19 to \$29, which is a totally different thing.

**CHAIR**—With the concurrence of my fellow committee members, we call Mr Balzary to the table, as we feel his giving evidence will be useful.

[9.28 a.m.]

**BALZARY, Mr Noel Clifford (Private capacity)**

**CHAIR**—Welcome. Mr Balzary, I might begin the questioning, unless my colleagues would prefer to ask their questions now. Mr Murphy, have you got some questions?

**Mr MURPHY**—I am not ready to put my questions to Mr Balzary. While Mr Rodda has been responding to your questions, I have been reading the submission provided by Mr Woodward's department, which is in response to my request on 23 June to provide a rebuttal to those issues raised by Mr Rodda. I am still going through that, but I will now cease reading that and look at Mr Balzary's submission. I will come back to my questions later.

**CHAIR**—Mr Cadman, have you got some questions?

**Mr CADMAN**—I am somewhat in the same position as my colleague, but I want to ask Mr Rodda about the court case. Customs seems to feel that you are demonstrating that malicious persecution rather than averments is the cause of the problem. Do you really contend that averments are the cause of the problem?

**Mr Rodda**—Yes, I do—definitely. In fact, I still have a couple more points I wanted to make as part of my opening statement. That reference to the specific terms of reference for this inquiry was one of those points. Subject to your wishes, I was proposing to go to the averments that were sworn in two of the sets of charges. There were five transactions; four sets of charges in relation to—

**Mr CADMAN**—I think you need to do that, if you would not mind. That would help us.

**Mr Rodda**—Before I come to that, I would like to make several more observations. Firstly, Madam Chair, you will recall that I was preparing a chronology of all of these cases for the previous hearing but, unfortunately, I did not finish it. I have now finished that and delivered the document to the committee this morning. Effectively, it replaces the previous submission, which was lodged incomplete. I must make a confession: unfortunately our photocopier died at 11 o'clock last night. We ran out of toner. So we did not finish photocopying all of the attachments. We have, however, completed three copies—one of which I have and two of which I have submitted to the committee. And I have three incomplete copies, which have the last six or seven annexures missing. Subject to your wishes I could—

**CHAIR**—We have completed the photocopying for you. We now have complete copies for everyone. I think we will accept this as a further supplementary submission.

**Mr CADMAN**—I so move.

**CHAIR**—That is resolved.

**Mr CADMAN**—Instead of diving into this, which you are asking a lot of us to do with no notice, Mr Rodda, you will excuse me if I make the comment that you have been so immersed in this process that sometimes the detail you have provided to us is beyond our capacity to absorb and the cross-references confuse us at times. I do not doubt their validity, but you are going to have to give us a bit of time to have a look at this to see whether we can handle it.

**Mr Rodda**—Certainly, and I apologise for the late submission. I had intended to finish it last week but the task has been enormous.

**Mr CADMAN**—No, that is fine. There is no problem with that. We can look at it.

**CHAIR**—It would be very useful for us to have. If you could answer Mr Cadman's questions as to the averments themselves, it would be very useful.

**Mr CADMAN**—That is good: it is covered and put to one side and we will come back to it. Is that all right?

**Mr Rodda**—Yes. I might very briefly explain what the submission is. The first seven pages deal with some general observations and three of the transactions. The last four pages deal with the other four shipments that were either seized or detained.

**Mr CADMAN**—It is a chronological summary of the events, is it?

**Mr Rodda**—Yes. Within the chronology, where I have made an observation or a comment about a specific issue, I have supported that comment with the relevant document—the document that supports the observation or comment I have made.

**Mr CADMAN**—If we have questions about that we will come back to you. Now we can move to the averments issue.

**Mr Rodda**—I will add one other point, if I may.

**Mr CADMAN**—Yes.

**Mr Rodda**—Mr Murphy asked me to provide a dot point summary of a number of the allegations. Mr Murphy, to a very large degree the answers to your questions are in the document I have presented.

**Mr MURPHY**—To support my colleague Mr Cadman, I should say that this is going to take some time to go through. It is very complex. Having just received this, there is no capacity for me to ask you any questions, because I will have to find time to read it. Moreover, Mr Woodward's department has exhaustively detailed responses to the issues that you have raised—in response to the evidence that was given on 23 June, when I asked him to give me a written response to the issues you had raised. Procedural fairness will dictate that you will need to see a copy of that. As I understand it from the inquiry secretary, in addition to the submission from Customs, under the letter of 21—

**Mr CADMAN**—Is that the one we received today, John?

**Mr MURPHY**—Yes, we received that only today. I am reading it now. It is dated 21 July 2003 and it is from Tom Anderson, Acting National Manager, Investigations and Enforcement Operations Branch. In addition to that, I am told that there are three supporting folders. I am going to be in meltdown trying to get through this. All of us—there are only three of us here today—are overwhelmed with information. You will need to see the response from Customs. I am going to have to get you to lead us. I am happy to do that so that I can take it away, absorb it and try and understand it. I dare say that Mr Woodward's department will need to see a copy of this, too, because we are basically getting the allegations and the counter point, and we are getting further evidence. This is making it extremely difficult. I want to be fair to everyone and get the truth.

Madam Chair, you might not have had a chance to read the latest Customs submission, but it paints a fairly bleak picture of the history of Mr Tomson's activities. At face value, you would say it was reasonable then for Customs to have a close eye on what he was doing. You probably have not seen some of this, and I am just reading it right now, so this is very difficult for us today. Quite frankly, Madam Chair, we will have to come back to this again at a later date.

**CHAIR**—Yes.

**Mr MURPHY**—I do not know how we are going to do it, because we have so much evidence. This is classic information overload and I do not know whether I have the capacity to read it all. If you can point me in the right direction to the most salient features of the evidence, that will help me, the chair and my colleague here a great deal, and we will do the best we can. You can be sure we want to be fair to everyone.

**Mr Rodda**—I would like to make it really simple. Only one of us is telling the truth—that is what it boils down to. I have not seen the Customs document, but I have seen the files on which I have relied for the purposes of my allegations and I know from my own experience and from the results of the investigation that was carried out overseas that Customs was proceeding on a completely false set of assumptions. I can do no more than make that assertion and support my assertions with the documents that I am relying on for that purpose. I will mention one last matter. You asked me at the previous hearing if I could provide a list of references from the interview with the overseas suppliers—Mr Grausam and Mr Delmenico—where reference was made to the question of prices and whether those prices were acceptable. I have a handwritten version of that, but I would like to type it up and deliver it to you later today, if I may.

**CHAIR**—Could we go back to my question then as to the significance of the averments in this whole issue.

**Mr Rodda**—Mr Tomson's position in essence is that, without the averments, the proceedings against him would not have been instituted. The key averments that were sworn were used as a substitute for evidence. They were a cover for the fact that there was no evidence. I will perhaps start with the charges in relation to the Steady Export transaction. I might get Mr Balzary to comment on this as well because he understands it.

**Mr CADMAN**—As I remember it, there are only a couple of issues: the way in which Mr Tomson does business and the way in which he makes payments.

**Mr Rodda**—Correct.

**Mr CADMAN**—That is the crux of the matter, isn't it?

**Mr Rodda**—Yes.

**Mr CADMAN**—Customs said, 'He can't be doing business this way. We contend he's doing business in another fashion and covering up the process. Therefore, we're going to make the statement that what he is telling us or what we see from the documentation is a fabrication.'

**Mr Rodda**—I think the investigation officer simply did not understand the way in which business is done at this level in South-East Asia. He made a lot of assumptions. It was very clear from a minute on 4 August 1987. Customs understood very clearly that Mr Tomson's modus operandi was to go to street stalls and small market operations such as the Fairfield markets or Paddy's Markets and that was where he bought his stock. He bought end of season run-outs and things that were essentially surplus, out-of-fashion stuff. Because those goods were shipped to Australia on the letterhead of a licensed export company—registered export company—these export companies were referred to as 'false suppliers' in the documentation of the Customs reports because they were not the actual sellers. There is an assumption underlying that that only the person who is the vendor can prepare the export documentation. That is nonsense. The entire Customs case was based on false suppositions. I would say further to that that it was based on an ignorance of what really happens. Nothing more than that—just simple ignorance.

**Mr CADMAN**—Are you saying that the capacity—I do not want to put words in your mouth, but I need to understand it—to make an averment allows a person to make an observation, not go behind the observation, and to present that to a court as a matter of fact?

**Mr Rodda**—That is correct. Perhaps we could illustrate this by going straight to some of these averments. I think they are at annexure 12 of my submission. For example, of the first set of four averments which relate to the Steady Export Co. shipment, No. 4 says:

the said entry for home consumption was false in a particular, namely, that the price paid for the subject goods was \$A2,462.83 whereas the price paid or to be paid was in excess of that amount.

**CHAIR**—That is averred.

**Mr Rodda**—That is averred and it is false. There was not the slightest scrap of evidence put during the trial to suggest that that entry for home consumption was false.

**Mr CADMAN**—Customs would further contend, I think, that the magistrate did not find that to be a problem.

**Mr Rodda**—That is correct. In fact when we asked for the charges in relation to the Cameron Trading shipment to be dismissed on the basis that there was no evidence led by the prosecution, the magistrate in effect said that he is required to take the prosecution's case at its highest, disregarding any evidence that maybe favourable to the accused.



**Mr CADMAN**—I am not a lawyer. I do not understand what you are saying actually. It would seem to me that, if stuff is produced in a court, the strength of that evidence relies on a capacity to have the person presenting verify its authenticity.

**Mr Rodda**—That is correct.

**Mr CADMAN**—Would the role of a legal officer, a magistrate or a judge normally be to test the strength that lies behind that evidence, or is that a matter for the person on the other side or is it what you seem to be saying—and I did not want to see this—that the magistrate said, ‘I don’t care what lies behind it, I will just take whatever claims are made at their maximum and accept those as being factual’?

**Mr Rodda**—My understanding of what the magistrate ruled was that, because the averments were also in evidence and also constituted prima facie evidence of what was alleged against Mr Tomson, they also had to be taken into consideration as a part of the Crown case.

**Mr CADMAN**—Take me through that because my understanding of an averment is it is not prima facie unless established to be prima facie. You cannot declare it prima facie, can you?

**Mr Rodda**—I believe the act says it is prima facie evidence.

**Mr CADMAN**—It is.

**Mr Rodda**—The effect is to shift the onus of proof.

**Mr CADMAN**—I am just speculating; on that basis the Law Council seem to have a point. The veracity of whether or not it is prima facie needs to be established before going before a magistrate. I think that is what they are saying.

**Mr Rodda**—Yes, and I agree with the Law Council’s view on that.

**Mr CADMAN**—I can understand why you would say that. Let us go back to what Customs are saying. I cannot ignore the significance of what they are saying. Even on the appeal, the magistrate’s contention that these things did not really matter was not examined. As I understand it, what Customs are saying—and I will ask them later—is that they contend that because neither the magistrate nor on appeal contested these averments as being prima facie or accurate, then they are accurate.

**Mr Rodda**—I am sure that is the spin Customs would like to put on it, but the point was that we were effectively ambushed with the case on the day of the trial. The prosecutor said in his opening address to the court—

**Mr CADMAN**—Just make the statement, you can give us a reference later.

**Mr Rodda**—He said that the case was going to consist primarily of documentary evidence and evidence from persons who would identify what those documents were and where they came from. In fact, I think he even said in relation to the documents obtained overseas—which we had not seen before the trial—that most of it was stuff that had been presented to Customs by Mr

Tomson. Obviously we knew what that was. But in relation to the documents obtained overseas, the prosecutor said that evidence is going to be led by the officer who obtained that material overseas, and it was then that it was sought by the prosecution to put that material into evidence. We decided not to object to any of that material going into evidence at that point because the prosecutor had already said they were going to lead evidence about those documents. We had the averments and we were presented with all this stuff on the day of the trial, including documents we had not seen.

**CHAIR**—A bit like us today.

**Mr Rodda**—Mr Tomson had assured me that he was innocent of any wrongdoing so we thought that we would not object to that because, if Customs were going to call a witness to give evidence about where that material was obtained and what it represented, then ultimately we would get the opportunity to test that evidence at that point. But, of course, it was never led.

**CHAIR**—I think we have to realise two things in this context. Firstly, Mr Rodda was not appearing for Mr Tomson—there was a barrister appearing for Mr Tomson. Mr Rodda was instructing. Secondly, it seems to me that the defence was between a rock and a hard place. Having heard the opening statement by the prosecution, they were entitled to rely upon, to my way of thinking, the statement that they were going to call evidence to prove their case, including what was set out in the averments.

**Mr Rodda**—Correct.

**CHAIR**—When they concluded their case, the defence was then faced with the proposition of either attempting to prove or call evidence to try and prove the Customs case for them and then rebut it, or moving that it be dismissed because the case had not been proven. That is the course of action they chose to take. But, because of the averments which are prima facie evidence and because no evidence had been called as that was the way the prosecution then chose to conduct the case, the magistrate found that there was a case to answer. It then went to trial, and Mr Tomson was vindicated.

**Mr Rodda**—Yes.

**CHAIR**—It was quite a nice piece of legal fancy footwork: saying that they were going to call evidence, letting the defence rely on that proposition then not calling evidence and the defence doing what is perfectly proper and saying, ‘Well, you haven’t proven your case; therefore, we ask for dismissal,’ was a perfectly legitimate legal tactic to take. But it resulted in the magistrate saying, ‘No, there is a prima facie case,’ so it proceeded to trial.

**Mr CADMAN**—It seems from what you have outlined, Chair, that nobody really examined any of the evidence very thoroughly at all—including the magistrate.

**CHAIR**—That is correct. I made the little side comment to you when you were saying that they were presented with a whole lot of evidence—a whole lot of documentation—on the day that it was a bit like us today.

**Mr CADMAN**—Yes, and we ought to stop that. We want your stuff—and this is for Customs and everybody else, thank you—a week before a hearing.

**CHAIR**—In a timely manner.

**Mr CADMAN**—We do not want this happening again. It is a waste of our time and it is a waste of your time. Do not do it to us.

**CHAIR**—That applies to Customs as well. One of the things that are pretty important is that one of the averments was that the prices as set out were wrong. Could you cite the averment for that?

**Mr Rodda**—Is that averment No. 5 relating to Steady Export Co. and charges under section 233(1)(a).

**CHAIR**—It will be set out in the summons. I have it here. No. 5 says:

the said invoice contained a statement which was false in a particular, namely, that the price for the subject goods was \$A2,462.83 whereas the price paid was in excess of that amount.

That is an averred fact.

**Mr Rodda**—Correct.

**CHAIR**—You say that that is false—

**Mr Rodda**—It is false.

**CHAIR**—and in the rest of your submission to us you have set out to prove that that is false, including Mr Grausam's evidence when he went to Thailand and took evidence that in fact showed that the way in which the system worked meant that that averment was not true.

**Mr Rodda**—Correct. In fact, it is not even supported by the document that he obtained in Thailand.

**CHAIR**—But no evidence was called before the magistrate to attest to the truth or otherwise of that averment. Is that right?

**Mr Rodda**—That is correct. Absolutely nothing was put to the court.

**CHAIR**—Okay. It seems to me that at the crux of this case is that averment, because if that averment is false the rest of it falls over.

**Mr Rodda**—Correct—and the following one, No. 6.

**CHAIR**—No. 6 reads:

the defendant caused an export declaration to be produced to Thailand Customs together with an invoice from Steady Export Co. Ltd. for the said goods which stated that the price paid for the goods was \$US1593.00 WHEREAS the price paid or to be paid was in excess of that amount.

And they are the two documents?

**Mr Rodda**—Yes.

**CHAIR**—So we are looking at the strength of averments and, if those two averments fall over, they have no case?

**Mr Rodda**—That is correct.

**CHAIR**—And in the long run when you went to trial and finally did call evidence that was what was found. Your evidence was believed?

**Mr Rodda**—Yes, we in fact called evidence about the overseas documents ourselves and explained to the court what the documents were.

**CHAIR**—I have another problem here. One of the reasons that Customs say they need to have averments is because it is too difficult to go overseas to prove the facts. That is what they say in their submission to us. They say that they need averments because it is too hard to go and collect evidence otherwise. However, in this case, they did go overseas and they did collect evidence.

**Mr Rodda**—Yes.

**CHAIR**—But the averment did not rest comfortably with the evidence they collected.

**Mr Rodda**—That is correct.

**CHAIR**—So on the one hand they say, ‘We need the averment because we can’t get the evidence,’ but then they went and got the evidence but still averred to a particular which you subsequently proved before a court was false. I will put it to Customs that, if they do go overseas and take evidence as to the facts, they ought not to have to rely on the averment, because they are actually taking evidence which they ought to be able to prove when they come back.

**Mr Rodda**—That is quite so.

**CHAIR**—This is an important question which we will put to Customs. Do you want to follow up on that, Mr Cadman?

**Mr CADMAN**—I just want to conclude by making sure that I have got my head around what Mr Rodda has said, that neither the magistrate nor the appeal—I don’t think you covered an assessment on the appeal—

**Mr Rodda**—The appeal was only concerned with the question of costs, Mr Cadman.

**Mr CADMAN**—So it would not look at whether the averments were factually based.

**Mr Rodda**—No.

**CHAIR**—No. The magistrate was in error in saying that costs could not be awarded and, therefore, there was an appeal against that. The appeal was upheld because the magistrate ought to have made an award for costs.

**Mr CADMAN**—The supposition can easily be formed then that the court has shown deference to the magistrate's decision by not querying the status of the averments. Is that right?

**Mr Rodda**—It was not even an issue for the appeal. It was not raised, nor was there any reason why it needed to be.

**CHAIR**—The only matter before the appeal was the question of costs and whether the magistrate had the power to award costs.

**Mr Rodda**—Mr Tomson had already been acquitted anyway, and that was not an issue.

**Mr CADMAN**—Okay. Even if you dismiss the court's examination as not being appropriate or relevant, then we would have to say that the magistrate gave proper consideration to all of these things and decided, despite your views on the matter, that everything was ridgy-didge and he could go ahead.

**CHAIR**—No. The magistrate determined there was a case to answer. That is what magistrates do in this sort of circumstance. They decide there is a case to answer and then the matter goes to trial.

**Mr CADMAN**—I understand that, but in that case is it fair to assume that the magistrate gave proper attention to the averments?

**Mr Rodda**—He plainly took them into consideration in considering whether there was a prima facie case made out against the accused. We have said in our submission that the magistrate relied on the averments for the purposes of finding that there was a case to be answered by Mr Tomson. Customs has responded to that by saying no, there were a whole bunch of other bits of evidence that the magistrate also relied on. But that is a disingenuous submission. The truth is that the whole of the case, as it was presented to the magistrate, misrepresented the situation anyway. It was claimed, for example, in the averments that the documents that Mr Tomson submitted to Customs were false in various respects. The magistrate accepted that those documents were in evidence and they were things that he was required to take into account. Customs had averred that they were false. At that stage no evidence had been heard from the defence in relation to that.

The point is that, because the documents were not false, and the only evidence before the court was the averment that said they were, the magistrate was then required to hear the defence in relation to that issue. If the averment had not been allowed into evidence, then the prosecution would have been put to proof of the accuracy of whatever it wanted to say in relation to that,

which of course it would not have been able to do and didn't lead any evidence about that, anyway.

**Mr CADMAN**—Just one final question in regard to averments. Do you think the examination of the Tomson case is relevant to this committee's inquiry into averments and what the future of averments should be?

**Mr Rodda**—Certainly. I think the Tomson case and the prosecution of Mr Tomson are a perfect illustration of why the power should be severely modified or abolished altogether.

**Mr CADMAN**—It is your view that averments should not be allowed to continue or should be modified?

**Mr Rodda**—That is my view. In fact, looking at the history of the averment powers, one of the reasons that it was included in the Customs Act in the first place was to overcome some problems about evidence. If I can give you an illustration: if an importer had purchased 100 bales of cotton and had an invoice for 100 bales of cotton, but 110 turned up on the ship and the bill of lading said there were 110, Customs would be entitled in those circumstances to seize 10. If they were numbered from one to 110, they might decide to seize Nos 101 to 110. But, if it turned out that the 10 that were surplus to manifest were really Nos 1 to 10, you would appreciate that in those circumstances Customs would then aver that the 10 that it seized were the correct 10 that were surplus to manifest. The defence would then bear the onus of proving that the 10 that were seized were not in fact the 10 that were surplus to manifest. You can appreciate in those circumstances that there is no dispute about the facts—everyone accepts that there are 110 bales of cotton and that 10 are surplus to manifest. So all that the averment really seeks to do is just narrow down what the subject of dispute between the parties in those circumstances is.

**CHAIR**—Namely, any 10 of the 110.

**Mr Rodda**—Yes, that is right. So if the defence then wants to argue that the 10 that were seized were the wrong 10, it bears the onus of proving that. That is really what the averment power is there for. I think that if it is used in that manner then it is being used correctly. But the way in which the averments were used in the prosecution of Peter Tomson—as a substitute for evidence—was a very plain abuse of the averment power. This supports the Law Council's submission that it should be abolished.

**Mr CADMAN**—So you would contend that the way in which averments can be used can encourage a bit of play that might be termed fast and loose?

**Mr Rodda**—Yes, most definitely.

**Mr CADMAN**—I do not want to put words in your mouth, but it seems to me that that is what you are saying and what the Law Council is saying.

**Mr Rodda**—That is very much what I am saying, Mr Cadman, yes.

**CHAIR**—In other words, that Customs ought not to be permitted to aver where in fact they can bring evidence that will prove or otherwise their case. By saying, ‘We’re not going to go to proof at first instance; we only want to aver,’ they are relieved of that responsibility.

**Mr Rodda**—Exactly. Let us look at the summons in front of us—the Steady Export transaction—and at averment No. 4 states:

that the said entry for home consumption was false in a particular ...

If Customs had been obliged to prove that to the court rather than merely make an averment about it, it would not have been able to do so. Without the three averments Nos 4, 5 and 6—

**CHAIR**—They have not got a case.

**Mr Rodda**—there is no case. This is what I am saying: without the power to make averments, this prosecution could never have proceeded.

**CHAIR**—It certainly seems clear to me that, without those averments, there is no case.

**Mr Rodda**—Correct.

**CHAIR**—Certainly, they may bring evidence as to other things, but those averments were crucial to the action that was brought.

**Mr Rodda**—What was even more astonishing was that, having made the averments, they did not even try to lead any evidence to support the averments. Another thing that we were criticised for in the Customs response that I have seen so far is that we had the opportunity to cross-examine the Customs witnesses about these matters. That is also a bit disingenuous. This was all sprung on us when the trial got under way. We did not really know, until I had had the opportunity to go and speak to the people who prepared the documents and the Steady Export transaction, what was really going on. So at that stage—the stage when we had the opportunity to cross-examine the witness—we really did not understand what the significance of the overseas documents was. First of all, the documents had not been put into evidence by the prosecution and, at the particular stage at which we had the opportunity to cross-examine the Customs witness, we did not know what the documents were either.

**Mr CADMAN**—That is a bit like us trying to make sense of all the stuff that has hit the deck today.

**Mr Rodda**—Yes. I can only apologise for that.

**CHAIR**—It is not only you; it is Customs as well.

**Mr Rodda**—Of course, when we did have the opportunity subsequently to find out what all of this was about, the truth emerged.

**CHAIR**—Let us go to what they did call evidence about. What evidence did they call?

**Mr Rodda**—My recollection—and I will need to refer to the transcript to confirm this, so please be aware that I may make an error—is that documents that were tendered to Customs by Mr Tomson were the subject of evidence. I think that the Customs agent who prepared the entry was called to confirm that he had prepared it, and he identified the documents that he had relied on. That was not in issue—we were quite happy to accept that—and that was true and correct.

**CHAIR**—They were the entry documents?

**Mr Rodda**—Yes. The information in those documents was correct—namely, the invoice and the entry prepared by the agent were correct. That was non-contentious. So we were quite happy for the court to accept all of those documents into evidence. The next lot of evidence called by Customs was the evidence in relation to cost of manufacture, which was given by Mr Prelea. Our view was that that was simply irrelevant. This was not a case about cost of manufacture. It was a case about whether or not the prices shown in the invoice were false and were not the prices which Mr Tomson had really paid.

**CHAIR**—So they called evidence on the periphery but not going to the heart of the matter. Did the defence cross-examine that witness?

**Mr Rodda**—We did. We also objected to him giving evidence, but unfortunately our submission on the relevance question was not recorded in the transcript, although the magistrate does refer later to the fact that the submission was made. Then we came to the crucial part. The witness list that was included in the front of each brief relating to each case showed that two officers, Messrs Grausam and Delmenico, were to be called to give evidence about the documents that had been obtained overseas. When Mr Grausam gave his evidence, he wasn't asked any questions about the documents obtained overseas.

The barrister and I conferred on what we should do next. The witness list showed that two officers were going to give evidence, so we just assumed that Mr Delmenico would then be called. Since he was the senior of the two officers we assumed that he would be called to give evidence. So we thought, 'All right; we will just wait and see what he has to say.' We were taken by surprise when, at the close of Mr Grausam's evidence, the prosecution closed its case. Mr Delmenico wasn't called at all. So we were then stuck with the prosecution's opening address that said, 'We will be leading evidence about this material obtained overseas.' In the end, there was no evidence led.

**CHAIR**—That is what I referred to as being stuck between a rock and a hard place.

**Mr Rodda**—Yes.

**CHAIR**—So the only evidence that was called—let's get this absolutely straight—was from the Customs agent who had prepared the entry documents, and that was not in dispute.

**Mr Rodda**—And a Customs officer who testified that he had received those documents.

**CHAIR**—Oh, so it was the Customs officer who had received them.



**Mr Rodda**—Yes. Once again, that was not in dispute. That is totally non-contentious, all of that evidence.

**CHAIR**—So that was an agreed matter. Then there was evidence as to the cost of manufacture.

**Mr Rodda**—Yes.

**CHAIR**—Which you considered to be irrelevant.

**Mr Rodda**—Yes.

**CHAIR**—And at that stage you didn't call any evidence because these were only the preliminary proceedings.

**Mr Rodda**—This was a trial. It wasn't a committal hearing. This was an actual trial.

**CHAIR**—Oh, this was the trial—I see. Quite right. When he found there was a case to answer, the trial then proceeded.

**Mr Rodda**—Yes, it proceeded; correct.

**CHAIR**—Because they cannot aver in criminal cases. So this is deemed to be a civil proceeding. Then the case is closed, he finds there is a case to answer, and so then you have to proceed to go into evidence. But in that preliminary part you didn't call any evidence to rebut the evidence about cost of manufacture. You waited until you had to go into the trial.

**Mr Rodda**—That is correct. We submitted that it was not relevant. But when the magistrate didn't rule it out, we then had to call some evidence.

**CHAIR**—Then there was evidence called from Mr Grausam, but he was not asked about the documents obtained from overseas which were the basis of the averments.

**Mr Rodda**—Correct.

**CHAIR**—And Mr Delmenico was not called, so you asked for it to be dismissed because you said they had not proven their case.

**Mr Rodda**—That is correct.

**CHAIR**—The magistrate said, 'Yes, there is a prima facie case. That is basically relying on those averments you are putting to us.' Then you had to present your case in the trial.

**Mr Rodda**—I might add that the magistrate in giving his response to the submission that there was no case to answer referred to the various categories of evidence that the prosecution had outlined as having been led and he simply said, in effect, 'All of this is before the court and it is all evidence.' But the difficulty I have with the way in which that was approached is that the

averments said, for example, that the documents presented by Mr Tomson were false, but no evidence had been led to support that. Although those documents were in evidence and the magistrate referred to the fact that these documents were in evidence and were therefore part of the Crown case, the problem was that the only evidence before the court to suggest that there was any falsity in them was the averment itself. We actually have no problem with the documents at all; they were fine.

**CHAIR**—He said that the documents were in evidence because when they presented you with a whole pile of documents to go into evidence you had said yes.

**Mr Rodda**—Yes.

**CHAIR**—And those documents were part of that pile of documents.

**Mr Rodda**—That is correct.

**CHAIR**—Again a bit like today. But you are putting to us that you did not have a problem with them going into evidence because you said they bore out your case anyway.

**Mr Rodda**—Correct. Our position was that everything that was material in those documents was true and correct.

**CHAIR**—To go back to the guts of the case, Customs averred that those documents were false.

**Mr Rodda**—Correct.

**CHAIR**—And you were happy for them to be in evidence because you said those documents were true and correct documents.

**Mr Rodda**—That is exactly the case.

**CHAIR**—So that is where we got to when the magistrate said, ‘There is plenty of evidence, of which those averments are part.’

**Mr Rodda**—Yes.

**CHAIR**—Okay. So what happened then? Did the case proceed on that day?

**Mr Rodda**—It then proceeded.

**CHAIR**—On that day?

**Mr Rodda**—I believe it was that day, yes. We did not seek an adjournment.

**CHAIR**—Tell me what happened then.

**Mr Rodda**—I am trying to remember who our first witness was. It is in the transcript anyway. We called a number of witnesses. We called Ms Chon Wanarat, who had been Mr Tomson's buying agent in Thailand. She gave evidence that the prices shown on the invoices given to Customs were correct.

**CHAIR**—So she said that the documents which had come into evidence were correct.

**Mr Rodda**—Yes. She was cross-examined at length, but that evidence was not touched.

**CHAIR**—Who else did you call?

**Mr Rodda**—We called Mr Balzary, and examined the documents that had been obtained overseas. Before we got to that point, Ms Chon Wanarat was also asked to give evidence about the export documents that had been obtained in Thailand and about which Customs decided to give no evidence. They were presented to her and she was asked to tell the court what they were. One thing she did point out to the court in her evidence was that the value of the goods in baht for the purposes of the export declaration was lower than the price paid by Mr Tomson; not higher, lower. The reason that it was lower was that the commission charged by the company that prepared the export documents was required to be deducted from the purchase price.

What happened was that Mr Tomson would purchase goods, he would get a docket showing the price and goods would be delivered to either the registered export company or the freight forwarder; I think it varied. When the export documentation was prepared, the company that prepared the documentation I think was Steady, although there is some dispute as to whether that was the case. Anyway, it does not matter. The documents were probably produced by Trans Air Cargo. They deducted from the gross sum paid for the goods by Mr Tomson a proportion of the money that he left in payment for the goods so that in effect only a net amount was given to the sellers. The difference between the two amounts—the amount shown on the invoice to Australian Customs and the amount on the documents presented to the Thai Customs—was the agent's commission. I am told by the people at Trans Air Cargo that the laws of Thailand require the deduction of any charge or fee for a service performed in Thailand. It is not to form part of the value of proceeds from foreign export sales.

**CHAIR**—That is by Thai law?

**Mr Rodda**—Yes. I did not confirm with the Thai government whether that was the case, but certainly the people at Trans Air Cargo told me that that was the case, and I believe them. I might mention too that when Mr Grausam and Mr Delmenico went to interview the people at Trans Air Cargo, two officers from the Thai Customs Service went with them.

**CHAIR**—You are saying that Thai Customs were in fact giving weight to the truth of what the export company said?

**Mr Rodda**—Yes. Certainly there was no suggestion in the record of interview that Mr Grausam prepared that the Thai Customs disagreed in any way with what they were being told.

**CHAIR**—Mr Balzary, would you mind telling us about the evidence you gave as to the value of the goods that Mr Tomson was buying.

**Mr Balzary**—My evidence was given in 1995. I do not have the transcript in front of me, so I may be a little hesitant. I was shown some sets of documents and asked to comment on them. I had not seen the documents until I had arrived at the court itself—possibly one hour before I was called. I only had a chance to peruse several bundles of documents outside the court. When I was questioned in relation to the documents, I pointed out that I could not in any way relate the export documents that had been put forth—prepared by the exporter and given to the Thai government, lodged under their requirements into exchange control regulations—to the actual invoices to Australia.

Naturally the dates were different. Albeit there may not have been a wide gap in the dates, the documents were not of the same date. I understand that normal commercial practice in Asia is to permit the preparation of such documents, especially those to fulfil export requirements, some time later. In some cases they are prepared earlier. So they can be prepared pre sale of the goods or at the time of the actual transaction to, in our case, Australia or post the transaction occurring to Australia.

I commented on the values and the dates. I could not relate one document to the other. All I could point out was that there was a difference of currency. The documents put forth to the Thai authorities were lodged in accordance with the Thai law—that is, in Thai baht and also in US dollars. The reason for the US dollars is that it is hard currency in Asia. To ensure that Thailand gets the proceeds of the transaction of the export sale back into its banking system, it wants it to come back in hard currency—the US dollar amount. That US dollar amount was different to the amount invoiced to Australia, which I believe was shown in either Australian dollars or Thai baht. I could refer to the document and tell you that exact amount, if you so wish.

On the other matters that I was questioned on, I was not aware that the Customs Service had raised in the court that they held the view that items of clothing and apparel could be sold for export at below cost of production. I was not aware of that. Selling goods below cost of production is commonplace throughout the world. It does not matter if we are in Japan, North America, the European Community, the United Kingdom or here in Australia when we sell to export. But there seemed to be some belief about this apparel that Mr Tomson had purchased. Mr Tomson, incidentally, purchased at the bottom end of the scale. Without being rude to Mr Tomson or any colleagues or peers around here, I would say the way he conducted his transactions is like a car boot salesman.

In Australia we have to deal with the Mitsubishi's, the General Motors Corporations and the Ford Motor Companies exporting goods to Australia, and they are at the high end of the scale and we are talking big numbers of dollars. The way that those corporations conduct their business is dealt with in Australian customs law in the same way as Mr Tomson, who I say is being like a car boot salesman; they all have to be dealt with in the same manner. There is no differentiation in the law if Mr Tomson goes to Thailand with some money in his pocket, selects with a buying agent who has preselected goods for him, pays for them and arranges for their shipment to Australia. There is no difference in Mr Tomson's treatment and that of the General Motors Corporations, the Mitsubishi's et cetera who are selling their goods and conducting their transactions into Australia but in a more professional manner and a more complete and precise manner. The same should apply to both. The law requires that. We have to deal with things even-handedly.

**CHAIR**—When you say the law requires it, are you talking about dumping provisions?

**Mr Balzary**—No. If I say the law requires it, I say that in terms of procedural fairness. If I were looking at a matter like this, I would need to look at it in a totally apolitical manner. For example, I could show no bias on how to handle this transaction.

**CHAIR**—I am sorry, Mr Balzary, I do not know how politics got into this.

**Mr Balzary**—By saying ‘apolitical’ I meant that I am here in the middle and I have to be neutral. If I am the valuer, the appraiser, I am a neutral party. I am not saying, ‘Okay, I’ve got a complaint about this good,’ or, ‘There has been a previous transaction which we found subject to doubt.’ Each transaction has to be dealt with individually; because the first one was wrong it does not necessarily mean the second one would be wrong. That is what I am trying to say.

**CHAIR**—What I am trying to get to terms with is that there is no law about importing into Australia goods which you have bought for less than the manufactured price unless they are in breach of, as I understand it, the dumping provisions.

**Mr Balzary**—That is correct.

**CHAIR**—Mr Tomson is importing fashion goods at the low end of the spectrum. There are plenty of people around here who send out little cards to people like me and other folk, which say, ‘We have been to Europe and we have bought up some of the best labels in town and we can sell them way below the prices.’

**Mr Balzary**—Absolutely.

**CHAIR**—They are buying the top end of the spectrum. They are buying the designer gear and they are probably buying it in the sales in Europe and bring it out here because of the difference in the seasons. That is not illegal either. As I understand it, you gave evidence—correct me if I am wrong—that this is a perfectly normal occurrence—

**Mr Balzary**—I did.

**CHAIR**—and that the evidence that was given by Mr Prelea for the prosecution was about the cost of manufacture of high-quality goods. We all know that good designers, even in this country, will have their designs manufactured offshore in China, Korea, Malaysia, Indonesia, Thailand or anywhere but they will still be high-quality, high-priced goods. Read the label on clothes we all wear and you will see it there. But this is not the product that the Tomsons were dealing in. Without putting words in your mouth, is that what you were saying?

**Mr Balzary**—That is exactly correct, yes. I was also questioned about, if I recall, close-out or end of season sales, export overruns and marginal costing of goods.

**CHAIR**—Does that included buying by weight?

**Mr Balzary**—I am not sure if I was questioned in regard to purchasing apparel by weight, but I know that you can. Actually, since giving that evidence, I have been privy to some of the

documentation obtained under disclosure from the Customs Service wherein it has been reported—I think, from the Tokyo office of the Australian Customs Service bringing it to the attention of Customs central office in Australia—that it is the practice to sell apparel by weight at certain times of the year. In effect, if you do not want to buy a dozen garments but you are going to buy 300 and 20 kilograms of product is stuck in a corner and is of no value to anyone, a price can be negotiated—offer and acceptance—to buy the bundle of the weight of goods. It is better to generate some cash flow and get rid of the goods rather than having them sit there.

This type of thing is very common in the apparel industry. I was a resident of New York City for many years, have family in North America and still travel there. It is common, especially at end of season. This applies to any goods, whether they be high-fashion goods, normal run-of-the-mill goods or low-cost goods—what I call cheap goods. But the cheap goods may emulate or copy the high-fashion, label goods. When those goods are out of style or it is the end of season—we are going from a North American hot summer into autumn and then a very cold winter—you have got to get rid of the goods, so they have close-outs. They will sell those goods at any price. Likewise, that will apply with end-of-fashion goods. We can have a situation where there are possibly export overruns where more than the required amount goods has been manufactured to order and there is a surplus left which can be sold off at any price, regardless of their value and regardless of their cost of production. Likewise, the practice of marginal costing for export is common throughout the world. In marginal costing, of course, one usually seeks to recover the direct inputs—the direct costs of material and labour—but you set aside your fixed overheads. I was questioned and gave evidence and spoke at some length, if I can recall, about those matters.

**CHAIR**—Thank you for that. So basically you are saying that it is not only a common occurrence in Asia but it happens in New York City, too?

**Mr Balzary**—Of course.

**CHAIR**—Going back to our terms of reference, we are looking at averments.

**Mr Balzary**—I wanted to add another comment in relation to close-outs.

**CHAIR**—Okay.

**Mr Balzary**—That applies in Europe and all throughout the world. Since 1901, our valuation system has only been amended in 1922 and again in 1975. Since 1975, there have been some subsequent amendments to date whereby we comply with the WTO rules. We have a simple one column valuation system whereby we are basically looking for the invoice price of the good set at a free on board port of shipment level. That is where we are looking.

**CHAIR**—That is the test?

**Mr Balzary**—That is it. That is the basis of the value.

**CHAIR**—I think that you alluded to the fact that Mr Tomson had previously given a price which was not FOB.

**Mr Balzary**—If Mr Tomson had given some other price—if it were C&F to Australia, which is the cost and freight, or the CIF value, which is the cost of insurance and the freight—it would be Customs’ practice to deduct, in the first instance, the amount of freight from the C&F price to bring you back to free on board port of shipment or, in the latter case, they would deduct the cost of overseas insurance and freight.

**CHAIR**—My recollection, without going back to look at the transcript from the last occasion, was that, although the documentation said CIF, the rest of the documentation showed that CIF was an error. Am I correct?

**Mr Balzary**—Yes.

**CHAIR**—The rest of the documentation was consistent with it being an FOB.

**Mr Rodda**—That is correct. An invoice had shown the terms of sale as CIF but that was wrong.

**CHAIR**—But that didn’t apply to this case here? Was this a previous occasion?

**Mr Rodda**—I think that one of these cases did have that error as well, the Winelux—

**CHAIR**—It was in one of these cases?

**Mr Rodda**—Yes.

**Mr Balzary**—I am sorry, I misconstrued you. Yes, that is right.

**CHAIR**—On the question of averments, it does seem to me that the crux of this case—certainly on the summons that we have been looking at—is averments 4, 5 and 6.

**Mr Rodda**—Yes.

**CHAIR**—To recap: no evidence was called initially to prove the substance of those averments.

**Mr Rodda**—That is correct.

**CHAIR**—So that we are all perfectly clear about what we are saying, the averments 4 and 5 say that the documents were false in the particular; they called no evidence to prove that statement—that is, to prove that those documents were false?

**Mr Rodda**—That is correct.

**CHAIR**—You accepted those documents into evidence because you say that the documents were quite correct and, therefore, you wanted them in evidence.

**Mr Rodda**—Correct.

**CHAIR**—When you finally did call evidence, the court accepted your point of view that, in fact, they were not false in the particular.

**Mr Rodda**—That is the effect of the magistrate’s ruling, yes.

**CHAIR**—Although it is a civil case, was the magistrate required to use a beyond reasonable doubt or balance of probability standard of proof?

**Mr Rodda**—He used the criminal standard.

**CHAIR**—He accepted that your evidence was beyond reasonable doubt?

**Mr Rodda**—That is correct.

**CHAIR**—And that the averment was therefore false?

**Mr Rodda**—I would draw that conclusion.

**CHAIR**—In the submission by Customs that we have received today, they say on page 6:

Of greater significance for present purposes is the fact that, save for averment 1, which was purely formal, Customs led evidence to prove each of the matters averred.

It seems to me that that is not true.

**Mr Rodda**—No, it is not true.

**CHAIR**—Averment 1 states:

The said John Hung is an officer of Customs currently holding a position to which the said Comptroller-General of Customs has delegated his powers to bring this customs prosecution.

That is pretty uncontentious.

**Mr Rodda**—Totally non-contentious. The same with 2 and 3, which are also non-contentious.

**CHAIR**—We are looking at 4, 5 and 6.

**Mr Rodda**—Yes. If Customs want to assert that they did lead evidence about 4, 5 and 6, I would like them to take us to that part of the transcript and tell us who their witness was.

**CHAIR**—It goes on:

Customs tendered the relevant entry and called evidence from a Customs officer as to the processing of the entry.

The entry was not in contention. The entry was agreed to.



**Mr Rodda**—That is right. The fact that the entry was lodged and accepted was not in contention, either.

**CHAIR**—It continues:

Customs tendered all of the supporting documents together with evidence from the defendant's customs agents as to the instructions given to them regarding the preparation of entry.

That is true. That is all agreed.

**Mr Rodda**—That is also correct and also non-contentious. We never disputed that.

**CHAIR**—It continues:

Customs tendered the overseas documents, which were admissible as business records. These were tendered without objections (see transcript ...

It cites the relevant pages. That is true—you wanted them in evidence because you said they were true.

**Mr Rodda**—That is right. Also, prior to the fact that they were tendered the prosecutor said they would be leading evidence to say where they came from and what they represented.

**CHAIR**—But they did not lead that evidence?

**Mr Rodda**—They did not lead that evidence.

**CHAIR**—The submission continues:

Customs also tendered answers to s. 38B notices and an affidavit of Tomson, sworn under his previous name of Paul Vilaysack, in the Federal Court proceedings.

**Mr Rodda**—That is also correct and again non-contentious.

**CHAIR**—That was non-contentious. It goes on:

These were tendered to prove his involvement in organising the shipment.

That was not in contention. Of course he organised the shipment.

**Mr Rodda**—He was the buyer. Of course that is not in dispute.

**CHAIR**—It then goes on:

Averments 6 and 7 ...

Seven must be in a different summons. Is it?

**Mr Rodda**—It must be.

**CHAIR**—Which is that one in?

**Mr Rodda**—It is not in relation to Steady Export. There is no averment 7. They might be referring to Gold Vincent. Is that possible?

**CHAIR**—I will ask them when they get here.

Averments 6 and 7 related to what Customs alleged to be the price paid for the goods.

That must be in another averment, because in the ones we have been dealing with they only go to averment 6.

While this was a disputed matter—

of course it was disputed; that is what it is all about—

Customs called expert evidence in relation to its contention that the price actually paid for the goods was in excess of that shown in the entry as well as the invoice and the export declaration that was lodged in Thailand. This was done through the witness Prelea.

**Mr Rodda**—That was Mr Prelea's evidence about cost of manufacture, which we submitted was completely irrelevant. It had absolutely nothing whatever to do with the price Mr Tomson paid for the goods. Again, I think there is a bit of hyperbole in there.

**CHAIR**—I want to recap, though. That is why I went through it with you. They called no evidence as to their statement that the documents were false.

**Mr Rodda**—Correct.

**CHAIR**—None at all. They called peripheral evidence about valuation which was not relevant, and when you finally went to trial we heard from Mr Balzary.

**Mr CADMAN**—Can I just ask for a point of clarification? Was the averment made before or after Mr Prelea's visit to Thailand?

**Mr Rodda**—I do not know that Mr Prelea ever went there.

**Mr CADMAN**—Before or after his statement? Do you know when the averment was generated?

**Mr Rodda**—From memory, Mr Prelea said he travelled to and from many countries in South-East Asia on a regular basis. He was involved in this matter right from the outset, too. He may have even been the original complainant—I am not sure of that—about Mr Tomson's transactions.

**CHAIR**—Say that again: Mr Prelea was a complainant?

**Mr Rodda**—He may have been. I think I recall seeing a document that said that but I am not certain. I do not have the document with me. I just remember seeing it some time ago, but I may be wrong on that.

**CHAIR**—Did Mr Prelea see Mr Tomson as a competitor?

**Mr Rodda**—Yes, and he is referred to in one of the attachments to the document I put in today.

**Mr CADMAN**—Are you saying that a person was brought as an expert witness who had perhaps a personal interest in this case?

**Mr Rodda**—I could not comment on whether he had a personal interest but certainly the evidence is—and I have included it in the brief today—that Mr Prelea had been involved in regular ongoing discussions with Customs about Mr Tomson's imports.

**CHAIR**—So he was having a whinge about Mr Tomson and then he was called as an expert witness against Mr Tomson?

**Mr Rodda**—I am not certain about the whinge part, but he was definitely called as a witness and he was the one who gave the opinions on cost of manufacture.

**CHAIR**—What nationality is Mr Prelea?

**Mr Rodda**—I do not know. I think he is European. He is certainly Caucasian.

**CHAIR**—I will certainly be asking Customs about that, but I simply do not accept that statement at this stage. Customs says:

The assertion that a *prima facie* case was found only on the basis of the averments should, in Customs view, be rejected for the same reasons.

In your submission to us, you basically say two things. You say that, one, there was no case proven concerning the falsity of these documents and that the averments were relied upon and that, without averments, they did not have a case—

**Mr Rodda**—That is correct.

**CHAIR**—because they did not call evidence—whether they could have or should have is another question.

**Mr Rodda**—Yes.

**CHAIR**—Secondly, you say that there was a degree of maliciousness in the way this was done.

**Mr Rodda**—I believe so, yes.

**CHAIR**—Let us go through the chronology, because I think it is quite interesting. This incident took place in 1987.

**Mr Rodda**—It was 1987 and 1988.

**CHAIR**—All of these five issues took place then.

**Mr Rodda**—Yes. There were actually seven—two of his consignments of goods were detained and never returned.

**CHAIR**—Okay, so there were seven issues. But there was no information laid, there was no prosecution undertaken until September 1992—five years later.

**Mr Rodda**—Yes.

**CHAIR**—Customs assert that you have made no nexus between any action that has been undertaken by Customs and the state of Mr Tomson's finances. They say:

... it is difficult to accept that a man with an annual turnover of \$1,000,000 could be ruined by the detention of goods worth, on his own valuation, \$13,000.

That seems a wee bit disingenuous to me. Could you explain to me why you say that the actions taken by Customs resulted in Mr Tomson's financial ruin?

**Mr Rodda**—If I might just touch on the \$13,000, that is a bit of a hyperbole. It may have been the f.o.b. value of the four shipments seized from Mr Tomson, but it does not take account of the fact that there were three other shipments in which he had a financial interest. In addition, we are only talking about the f.o.b. price. When you add the freight and the duty and the various other costs associated with getting the goods up to a wholesale level in Australia, you are talking about a far more significant amount. In fact, in regard to the five shipments that were seized, Customs valued those shipments at, I think, \$231,000, so I would like to know how they got from \$13,000 as a value to the \$231,000 that they offered to return them for.

**CHAIR**—So they were saying that \$231,000 was the retail value.

**Mr Rodda**—That was the value that they were prepared to return them to Mr Tomson for. In fact, they sought a security from him for that amount.

**CHAIR**—It is a bit disingenuous of Customs to say in their submission to us that we are talking about \$13,000 worth of seizures when they are saying, 'You can have your product back for \$231,000.' I think that is a bit rich.

**Mr Rodda**—Yes, I would like to hear their explanation for that. Probably more importantly, these seizures and detentions took place over a period of certainly more than six months. During that time, Mr Tomson's businesses had no trading stock. As you would appreciate, if you have a regular turnover because you have a high volume of stock going through your outlets, it is very

easy to maintain profitability, but as soon as you lose your stock, you have the ongoing costs—he had a number of shops, he had staff, he had lease costs—and as soon as the turnover through lack of stock disappeared, he still had the continuing costs, and so he depleted his financial reserves very rapidly.

In fact, for a period of two years or so, because he had leases of varying lengths on the stores—two or three years—and he could not get out of his leases, he had to continue to buy in stock from other importers just to maintain a turnover. But, of course, buying at the landed duty paid price from other people who were already importers left him with very little scope for a reasonable return on that cost and, over a period of time, his business went broke. I think by 1990 he had effectively ceased trading altogether. He closed his shops overseas and I think he lost his timber mill in Laos.

**CHAIR**—You cannot tell me Customs would not be aware of that.

**Mr Rodda**—I do not think they were aware of the timber mill in Laos.

**CHAIR**—Not the timber mill, but they would understand that someone who was in business would have costs that they would have to bear.

**Mr Rodda**—I would certainly hope that Customs would understand that.

**CHAIR**—Customs also say, at page 20 of their submission:

Contrary to what was said by Mr Rodda on the *60 Minutes* program, the security did not require the payment of \$240,000. It only required the payment of a bank fee for providing the guarantee. The guarantee was to be conditional on Customs successfully prosecuting Mr Tomson and the goods having been sold by Mr Tomson in the meantime.

**Mr Rodda**—That is rubbish.

**CHAIR**—Could you explain why that is rubbish?

**Mr Rodda**—Yes. I think I have included the letter from Customs and the document showing how the \$231,000 was arrived at. It is one of the attachments to the document that I put in today. It explains the reasoning, too, for arriving at the \$231,000. In fact, in relation to the Lanwren shipment, Mr Tomson was asked to pay \$59,000, and the balance of the \$231,000 was the difference between those two sums. I included that document.

**CHAIR**—Do you know which attachment it is?

**Mr Rodda**—Sorry, Madam Chair, I would have to hunt through to find it.

**CHAIR**—We will have a break at 12.30 p.m. today, so we will start to hear Customs before that. We will resume again at two o'clock, but we might be able to peruse some of those documents and work within that profile.

**Mr Rodda**—I will find it during the adjournment.

**CHAIR**—The Customs submission says:

As to the amount of the security, Mr Rodda had sought release on the giving of a security set to cover the market value of the goods if sold. The security to which Customs agreed was to be a bank guarantee to cover their market value, thus protecting the revenue (on the basis that the goods would be forfeited to the Crown if Mr Tomson was convicted).

So they were going to give him his goods back if he paid \$231,000 for them.

**Mr Rodda**—That is my understanding of the position.

**CHAIR**—But, if he is convicted, the goods would be forfeited. But he probably would have sold them by then, so the bank would have to pay the guarantee.

**Mr Rodda**—The end result would be that, yes, he would not be able to recover that.

**CHAIR**—The Customs submission continues:

The market value set by Customs was based on sale prices charged to wholesale customers by Mr Tomson for similar goods.

So the statement that it is only \$13,000 and it would not ruin him was pretty disingenuous, it seems.

**Mr Rodda**—I would have thought so.

**CHAIR**—Their submission also says:

... Customs does not believe that Mr Rodda has identified any evidence to support his allegations.

Your allegations are in two parts: one, that the averment was essential to the case proceeding; and, secondly, that there is a malicious element.

Nor has any evidence to support them come to light in the course of Customs' own inquiries or through the inquiry by Mr Geoff Bellew ...

You say, with regard to the inquiry by Mr Bellew, that he did not look at the evidence which you had already supplied to Customs. He simply relied on what?

**Mr Rodda**—If he did look at sections B, C and D of my submission, he has made no reference to those sections in his report, so I really cannot comment on what he may have found.

**CHAIR**—In any event, we are in a position which is better than Mr Bellew's position in the sense that we have now got it all on the public record.

**Mr Rodda**—Yes.

**CHAIR**—Customs also say it is not the case that the prosecutions were only commenced on the basis of averments. Their submission says:

... the Magistrate did not rely solely or even primarily on the averments in concluding that a *prima facie* case had been established.

I think we have dealt with that.

**Mr Rodda**—Yes, they keep trotting that out. I do not believe that.

**CHAIR**—I do not accept that. I think we have established that there was no evidence led to prove what were really the fundamental allegations in the case. The Customs submission says, ‘There is no support for Mr Rodda’s submissions that Customs’ continuing interest in Mr Tomson was unmerited.’ I want to know why it took five years. It continues:

The multi-layered decision making process within Customs in relation to taking s.214 action and the fact that at first the recommendation to take such action was not approved demonstrates, in Customs view, an appropriately objective approach.

If Customs thinks five years is okay to make those decisions, I beg to disagree.

**Mr Rodda**—I might add that the first suggestion of a section 214 action came in, I think, July 1987. By an amazing coincidence, because a Customs agent made an error in an entry a couple of weeks later, Customs then relied on that error as the purpose for swearing an information to obtain a section 214 search warrant. There is some very interesting deliberation on the file over the moral issues surrounding the fact that they were relying on what appeared to be an inadvertent error as the basis for swearing a search warrant to raid his home, his shops, his accountants—

**CHAIR**—If my recollection is correct, we had a similar problem in Midford with regard to a 214.

**Mr Rodda**—Yes. In fact, on the day that Mr Tomson’s application was to be heard in the Federal Court, another section 214 warrant was served on him as he was getting ready to go to court, and his documents were seized on the morning that the hearing was to commence. I understand that another warrant was served on his solicitors the same afternoon and executed at the office of his solicitors.

**CHAIR**—What year was that?

**Mr Rodda**—I think that was 27 June 1988. Again, I have included the warrant in the material that is attached to today’s submission.

**CHAIR**—All right. Then Customs state:

... there were a number of remedies in relation to the return of these goods—

the seized goods—

that Mr Tomson either abandoned or failed to take up.

That is, the release on security.

**Mr Rodda**—But that is nonsense. We asked for those goods; we claimed them. The correspondence from Arthur Young to Customs, commencing right from the time of the seizures, requesting release on security was just voluminous. In fact, I have included in the material put forward today a copy of the original letter sent by Arthur Young to Customs—this is their file copy—where officers have made endorsements on it. It includes endorsements like ‘do not reply to this letter’ or ‘no reply at this stage’. They just kept fobbing us off. I have included the copy of those documents from Customs’ own files.

**CHAIR**—We have dealt with the \$240,000; if convicted you are in double jeopardy, I suppose. And I dealt with the point that you showed there is no nexus between action taken by Customs and the state of Mr Tomson’s finances. I think we have dealt with that too. I will be interested to hear Customs’ point of view when we take evidence from them. Have you got questions?

**Mr CADMAN**—No, I am just wondering whether Mr Murphy is heading back to his chair to pick up the baton at this point.

**Mr MURPHY**—Madam Chair, I would like to ask a lot of questions but I will not be asking a lot of questions, because we are all drowning in paperwork. I want to put on record firstly for Mr Rodda that, in relation to the questions that I asked Mr Woodward on 23 June and the other evidence that was given on that day, Customs have come back with a 35-page response, including attachments. The response argues, in essence, that there is no evidence of any unfairness arising from the use of the averments in Mr Tomson’s case and summarily—because you have not seen this and you will get a copy of it because you will need to see it—says that the magistrate in the Tomson case concluded, in effect, that there was nothing improper or unreasonable in the investigation and prosecution of the defendants; that Mr Rodda has not identified any evidence to support his allegations, nor has evidence to support them come to light in the course of Customs’ own inquiries or through the inquiry by Mr Geoff Bellew; that the magistrate did not rely solely, or even primarily, on the averments in concluding that a prima facie case had been established; that there was no support for Mr Rodda’s allegation that Customs’ continuing interest in Mr Tomson was unmerited; that there were a number of remedies in relation to the return of the seized goods that Mr Tomson either abandoned or failed to take up; and, finally, that Mr Rodda has made no nexus between any actions undertaken by Customs and the state of Mr Tomson’s finances. Customs say that it is difficult that accept that a man with an annual turnover of a million dollars could be ruined by the detention of goods worth—on his own valuation—\$13,000.

Mr Rodda, bearing in mind that the chronology of events in your submission today—and other supporting paperwork—amounts to something like 11 A3 size pages in spreadsheet, which clearly Customs people must see to respond, it is very difficult for us to get this information now.

Madam Chair, I will flag with you that I want to ask Mr Balzary a few questions, because I have had the opportunity now to read his submission, which we just got an hour and a half ago. I think there is a need to somehow call a halt to this paper warfare and give Customs one last



chance to have a look at all this, for you to have a look at what Customs said and to focus on what you think is critical to this matter. The next time we have a hearing, if there is a need for the witnesses to be called once again, we need to have a couple of weeks before the hearing because we cannot absorb all this paper. It is just impossible to have it thrown on the table today. I think you would appreciate that. We are not being fair to you and we are not being fair to Customs if we are trying to resolve this today, because clearly we cannot.

**CHAIR**—Mr Murphy, I think we made it quite clear. We made the point that we are in the same situation that Mr Tomson and Mr Rodda were in when they had a whole heap of paper put to them in the court.

**Mr MURPHY**—That was the very thing that I was going to ask Mr Balzary. If I understood what you were saying in relation to these five bundles of evidence—and I thank you in that you have tried to make it easy for us with this five page submission—that you actually saw the documentation only an hour before the court?

**Mr Balzary**—Yes, that is correct. When I gave evidence and appeared as a witness in 1995, the first time that I had seen the documentation was one hour before I went into the court. I examined the documents in the foyer.

**Mr MURPHY**—All right. Before I give you a chance to succinctly respond to this I will draw your attention to what you said in your summary, because your particular submission, which is dated the 22nd—which I received a little over an hour and three-quarters ago and have been reading and trying to listen to the evidence and absorb it and I do not understand it all—needs to be given to Customs. I am not asking Customs to respond to it today, because I am not sure that they could. I will ask you to make a comment on it. I ask you, Mr Rodda, if it helps the committee—

**CHAIR**—In fairness to Mr Rodda, I took Mr Rodda through those points that you just read out.

**Mr MURPHY**—That is right.

**CHAIR**—He answered them all.

**Mr MURPHY**—If you are satisfied that he has answered them, that is fine. I am not asking you to ask further questions. I just wanted to give him the opportunity to add to anything that he has said in response to your questioning and the summary of what Customs have put to us in response to the evidence given on 23 June. I want to give him that opportunity now because I really do not think that if we just deal with little pieces of evidence for the rest of the day we are going to get very far with this.

I am not trying to truncate the inquiry. I have never had an inquiry with so much paperwork. It is highly technical, and I am used to dealing with this; I have had a career in this sort of stuff, but I am finding it very difficult. If we are going to be fair—as I know we all want to be fair to both parties to get justice here—somehow or other both sides are going to have to make this very simple and give us the comic book version, because that is what we are going to need.

**Mr Rodda**—I made the suggestion to Customs in February 2000 that we should sit down together and come up with an agreed statement of facts and that was rejected out of hand. I think it might be helpful if we could do that.

**CHAIR**—There are two issues I would like to mention here. Mr Rodda has endeavoured to negotiate a compensation payment with Customs, which he feels Mr Tomson is entitled to. Our inquiry is looking at the averment question and that is why I specifically said that the evidence Mr Rodda and Mr Tomson have been giving is in two parts. The material contained in the averments is the guts of the case and that they did not lead evidence initially about the averments—the ones that relate to the validity or falsity of the documentation. No evidence was led. It was left to the defence to prove that in fact those documents were valid.

**Mr MURPHY**—And that is what appears unfair.

**CHAIR**—That is what appears unfair. It has taken from 1987 and the seizure to 1999 to get a final question even partially on costs, and that does not seem to be a just situation. I acknowledge Mr Rodda is seeking—and has been seeking since 2000—a compensation payment. We are examining the averment question, and in the course of that we are showing the rest of the evidence. Customs has come back and said, ‘This is not really relevant to your inquiry because it is all about malicious prosecution.’ But I am satisfied that this whole thing hangs on those averments.

**Mr MURPHY**—I accept that. I am impressed that Customs has been able to come up with quite a deal more information in response to my request to answer those four allegations that you raised and which you will need to see. I acknowledge that this goes back many years and that Mr Woodward would not have any first-hand knowledge at that time of the issues involved in this case. There seem to be two arms to this inquiry: we are looking at averments but also looking at a case which got a lot of currency on *60 Minutes*. Against that background and that I am an accredited mediator who sees great merit in mediation, I am going to invite you to respond to the welter of paperwork that Customs has given me and the committee today and also your exhaustive paperwork and to have one last go at trying to synthesise this and to make it simple. I would like to think that both Customs and Mr Rodda, as representative of Mr Tomson, could somehow get together and there could be a mediation. I would be happy to do the mediation but that is probably inappropriate.

**CHAIR**—You might have a conflict of interest there.

**Mr MURPHY**—Yes, I think there would be a conflict of interest. I think it would be very good for both Mr Tomson and Customs because, when I read what you are saying, Mr Rodda—and I accept what you are saying is in good faith—you are saying that Customs is lying, and we are going back years. Customs are defending their position because it has been upheld by the courts.

**Mr Rodda**—Which court?

**CHAIR**—No, Mr Rodda’s position was upheld by the court.

**Mr MURPHY**—Mr Rodda’s position has been upheld by the court. I am sorry.

**CHAIR**—Customs lost.

**Mr MURPHY**—I am sorry about that. That is a symptom of trying to read all this paperwork and listen to you at the same time.

**Mr Rodda**—I know how you feel.

**Mr MURPHY**—I think it is eminently sensible and I would like to encourage Customs and you to try and either go through a formal mediation or sit down together and come to an outcome which is acceptable to both parties and put the past behind you and move on. We will get on with our inquiries, because the issues that the Chair has raised in relation to this case are very relevant. Who is to say that this cannot happen again? Customers are relying here in Australia on averments from overseas and it is very difficult. In this case they chose to do their own job on Mr Tomson, and I am telling you—with the experience I have—I would have done the same thing too. I would have gone after Mr Tomson with regard to the evidence that Customs has come back to us in this 35-page submission. There is enough smoke there for me, and this is with great respect to Mr Tomson, that I will have a very close at him too.

**Mr Rodda**—I will read that submission with great interest.

**Mr MURPHY**—To facilitate the committee, would you like to add anything to what Madam Chair and Mr Cadman have asked you and to the points I raised on the Customs submission? If not, I will give Mr Balzary the opportunity to talk to his statement. I just want to draw his attention to the summary of what he said, and he can put something on the record. I want to leave it at that.

**Mr Rodda**—The only point I would like to take up with your comments then are that you have referred to what Customs have said. They have denied that any of these averments are false. Without wishing to be facetious, I will aver that they are. I would like to hear their explanation for why they are not and get them to take us to the evidence that was presented during Mr Tomson's trial to prove that the averments were true—reverse the onus of proof.

**CHAIR**—I think that would be interesting, Mr Murphy. It would help me. I have had a look at the submission. You said that you would have acted to pursue Mr Tomson because of what Customs have told you. Could you just highlight that bit for me? What was the bit that caused you to say that?

**Mr MURPHY**—I have read to only page 13 of the submission. Accepting that what Customs are saying to me is their belief about Mr Tomson's conduct of his business, I would have had a close look at him. If you want me to, Madam Chair, I am happy to go through what they have said, but it is here in the submission from Customs. Mr Rodda can read it, if he wants to.

**CHAIR**—My recollection is that we did deal with some of this matter the last time we met, but I think it is worth while going through it. I think it is quite valid. Customs say in their submission:

By 20 August 1987—the day of the section 214 action in relation to the firm Thongson Imports and Exports—Mr Tomson had a history of non-compliance ...

**Mr MURPHY**—That is right. Exactly.

**CHAIR**—You then go on to see what is the substance of that.

**Mr MURPHY**—I have got that highlighted here.

**CHAIR**—We should ask about it. It is a good point.

**Mr MURPHY**—Okay. We will go through it.

**CHAIR**—The submission states:

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

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

**Mr MURPHY**—Exactly.

**CHAIR**—It continues:

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

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

This question is the same as the low value question that we have been looking at. We have found that the premise on which they have been operating, which is that you are not allowed to buy under manufactured value price, is just not right. It continues:

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

"Comparative checks of the imports of the three owner code since 1984-87 reveal some startling anomalies

The goods have the same origin, very similar/same classification, same/similar suppliers - however, since 1984 the Customs limit values has dropped considerably. This is a remarkable achievement in view of the type of industry (manufacturing) and the rapid decline of the Australian dollar against all currencies ..."

It goes on for several more pages.

**Mr MURPHY**—I agree with him wholeheartedly. I just highlighted those bits which reflect adversely on Mr Tomson. Clearly, Mr Rodda will want to go through that very carefully. This is going to take time—we are not going to resolve it today. What you were reading is exactly what I was going to read out in response to your question to me of why I would go after Mr Tomson if I were auditing him. That is exactly what I would do—have a close look at him—because, if I accept what Customs says, there are serious questions of integrity being raised about Mr Tomson. I am not saying that that is the case, because we have other evidence that you are putting forward here that Customs is lying. I have no clue who is telling the truth.

**Mr Rodda**—Although you are aware that I have not read this document, I can tell you right now from what I have seen in the Customs files that it was obvious right from the outset that Customs was under a complete misconception about the way people should go about conducting the business of purchasing apparel in South-East Asia. Some of the questions that Mr Tomson was asked in section 38(v) notices were, ‘Can you supply a copy of the manufacturer’s catalogue and price list?’ They already knew from the minute on the file dated some time in July 1987 that he had purchased his goods in cash transactions on a face-to-face basis with small street vendors. How on earth would those people possible be able to produce manufacturers’ catalogues or price lists? They were asking questions to which they knew there was no answer. They were seeking information which they knew would in all probability not exist. That was the mindset right from the outset. As I said, I have not read this document yet, but I know from my examination of the files that that was the way that they approached it.

**Mr MURPHY**—That is why my instincts are telling me that, for the purposes of the alleged miscarriage of justice in Mr Tomson’s case, a mediation, for example, would be good. But the Tomson case raises very serious issues in relation to this inquiry that we need to address because someone else could be sitting here in 10 years time going through the same experience.

**Mr Rodda**—Yes.

**Mr MURPHY**—If nothing else, I would like to think that this inquiry would avert such a future outcome. I might take that document back from you.

**CHAIR**—Obviously, this information will be made available to you. This submission was received by the secretariat in the last 48 hours with three volumes of attached documents. Please tell me whether the document that you have provided us with this morning contains any additional information from the information that you have provided us with previously, or does it just put it in a more orderly fashion.

**Mr Rodda**—Most of the stuff in today’s folder is material that I have not given the committee before, apart from some of the import documents.

**CHAIR**—There is no doubt that we are going to need to hear from you again and Customs again, because they are going to have to have the opportunity to go through the document that you have given us, just as you are going to have to have the opportunity to go through this documentation that has been given to us today. With regard to the part that I read out, do you want to say anything about that, or do you want to leave it till you come on another occasion?

**Mr Rodda**—I think I will defer on that, Madam Chair. The reason I am seeking that indulgence is that I have been working until one o'clock and two o'clock in the morning on this for the past few weeks, and I am just exhausted.

**CHAIR**—It seems to me that what Customs is saying here—and no doubt they will tell me that I am wrong in this assertion when they come to give evidence—is that basically all the things that they say about wanting to have a look at Mr Tomson is on the basis that they thought he was underdeclaring the value of his goods because they thought he was buying too cheaply. Everything flows from that.

**Mr Rodda**—That is correct. I think that the view that prevailed in Customs at the time—and this is something that emerges to me as a former inspector and senior inspector of valuation in the Customs department—was that there was an underlying assumption in the investigation branch that you cannot lawfully purchase goods for less than the cost of manufacture. That is just rubbish. It is also ignorance.

**CHAIR**—There is a bit of a problem that has always worried me about these cases in that, since this case, we have had a few more referred to us. It does worry me that, in each case—whether it was Midford, Mr Tomson or the other people coming from it—the people all have foreign names.

**Mr Rodda**—I might mention something else too. I hope I will not offend anyone by saying it. It was said that I alleged that Mr Tomson was not given a proper opportunity to explain his situation to Customs—to explain the basis for his dealings with his suppliers overseas. Customs pointed out that a letter had in fact been sent to Mr Tomson inviting him to come in for an interview. Certainly, that is true: Mr Tomson was invited to go in to see Customs to present his facts. But the perception in the importing community—particularly the Asian community—at that time was that, if Customs invited you to drop by to have a chat about your imports, that was a bit like getting an invitation from the Gestapo to drop by and discuss your Jewish ancestry. You just did not go in.

**CHAIR**—It also worries me that they say what a terrible thing it was that two Customs officers came by and went into his shop to check on the prices. I think that, if you were running an Asian shop, and Mr Schroeder and Mr Taylor turned up to look at your prices, you would get a bit of a shock, too.

**Mr MURPHY**—Mr Balzary, in your submission concerning the approach taken by Customs to determining the value of the goods imported by Mr Tomson, you give an analysis of those five bundles of documents in relation to the five specific shipments that were arranged and imported during 1987 and 1988. I had planned to ask you a few questions about each of those but—because I am going to get a copy of this, and Mr Woodward is going to get a copy of this, too—I am just going to read your summary because that brings it all together. I will ask you to respond and put anything else you would like on the *Hansard* record today, and I will ask Customs to respond to what you say. In that submission, which we have just read as we have been listening to you this morning, you say:

In summary I believe the valuation decisions were improperly based and they, along with other punitive and delaying actions, may have led to the demise of Tomson's business in Australia. I am not able to comment further in this regard.

When the Customs Service has reasons to doubt the veracity of an importation it most certainly has the authority to have questions answered using its powers under Customs Act Section 38B. If it is not satisfied with the replies, or has further reason to doubt, it can adopt other approaches available to it under the Customs Act. Securities can be taken from the importer as a form of liability, and if not satisfied, formal demands for the duty can be made. Alternatively if it is suspected that the value is incorrect then formal demands can be made and the importer can be permitted to pay the duty under protest. This then leaves the matter open and the importer can continue to trade—

**CHAIR**—But that did not happen in this case.

**Mr MURPHY**—That is right. You continue:

... even although at penalty because of the additional duty paid but in dispute.

It would appear these courses of action were not made available to the importer, let alone considered by the Customs Service.

I would like to give you the opportunity to succinctly support the conclusions in your summary. I will leave it there.

**Mr Balzary**—My first conclusion is my belief, my opinion, from looking at the documents that were available to me, that the valuation decisions were improperly based. There were five shipments in question which have been subject to valuation decisions made in 1992. There was a shipment from Taiwan, there were two shipments from Thailand and there were two shipments from Hong Kong. In regard to the shipment from Tainan and my examination of the documents, there is no reason to doubt the documents, other than for the Customs Service's previous actions in regard to inquiries into Mr Tomson's modus operandi and his methods of trading.

The Taiwanese shipment was from a company called Winelux. I know that the Customs Service have a difficult time and they are looking at a difficult matter. I also looked at my experience—what I have done in the past and what I do now. If I look at something I have to look at it in an even-handed way and I have to look at each individual transaction on its merits. In regard to the shipment from Winelux Enterprise Co. in Taiwan, Customs admit that they cannot disprove the valuation—the value placed on the invoices produced to Customs. They were given evidence of the money price paid, which they disregarded. They made inquiries in Taiwan, in Taipei, which to me were convoluted and inconclusive if one reads the record of interview. I know that to make such inquiries in these places you have to go into back allies and little shopfronts and basically behind boxes—it is very difficult, together with the fact that there is also a language difficulty.

Having said that, Customs saw fit, despite the point that they could not disprove the value—and the value was \$A2,592—to say that there was a false shipper. This false shipper was the person who prepared the export documentation. Let us put it in simple terms: someone has to prepare the export documentation. In this case it was the Winelux company, together with the freight forwarder. It appears to me from what I can see in the documentation that there could have been a common ownership or a common interest between the freight forwarder and the Winelux company.

Obviously the arrangements were made between Mr Tomson and Winelux to bring these goods together, prepare the documentation and ship them to Australia. Customs disregarded these values and eventually detained them and this led to the seizure of the goods. Some years later they valued the goods and they increased the value by some 231-odd per cent. They said that the value of \$A2,592 was not acceptable and they relied upon a value placed by Mr Prelea which increased the value by 231-odd per cent to \$A8,578.

**CHAIR**—Which was a sort of manufactured price. Is that what they were saying?

**Mr Balzary**—No, this was the valuation opinion given by Mr Prelea, I gather, upon examination of the samples within the shipment.

**CHAIR**—Did he say that this is what it would have cost to make them?

**Mr Balzary**—Yes, I believe so.

**CHAIR**—There is a difference between alleging that is what he paid for them and Mr Prelea's evidence, which is what they would have cost. It was on the supposition that you cannot buy something for less than what it costs when we have established that you can.

**Mr MURPHY**—Was Mr Prelea's valuation a current one as of when he looked at it some years later?

**Mr Balzary**—I cannot comment. I do not know.

**Mr Rodda**—It was a valuation that was meant to be contemporaneous with the purchases by Mr Tomson.

**CHAIR**—So that was years later or at the same time?

**Mr Rodda**—He gave the evidence years later but his evidence related to what had happened in 1987.

**CHAIR**—So five years later he said they would have been worth \$8,000 not \$2,500?

**Mr Rodda**—Yes.

**CHAIR**—Clever.

**Mr Balzary**—I guess I am an old Mustachio Pete but I like to have a look at things. There is an old phrase that I learnt in the Customs Service—my father was a Customs officer also—'in the absence of any special reason for doubt'. In my opinion, if I look at this shipment from Taipei there is no special reason for doubt except the history of Mr Tomson who obviously has some previous performance. That is no reason to say, 'We are disregarding all this information. You are not an honest John anymore; you are someone else. You are no good.' The point is that you look at things on a transaction by transaction basis.



If this had been done and there was doubt then the goods should have been released to Tomson on payment of security. Alternatively, and if Mr Tomson wished, they could have given him the right to pay the duty under protest so the matter could be properly argued. Then he would have been allowed to continue to trade, while in this case he was not. That is my point with that shipment from Taipei.

In relation to the two shipments which I call bundles 2 and 3, one was from the Steady Export Co. from Thailand and the other was from a company also in Thailand with the name of the New Calcutta Store. Again the Customs Service made inquiries in Thailand in Bangkok. They made inquiries with the Thai authorities, with the Bank of Thailand and then with Thai Customs. They received documentation from those people. I know no more about what those discussions were.

The point at issue is that there was again no reason to disprove the actual invoiced amounts on the invoices of those two shipments except they said—and I find this very difficult to comprehend—that they had evidence of another payment to Thai Customs. That is what is in their documents. With respect to the people conducting the investigations or the inquiries over there—and I know it is very difficult—it seems there has been some misunderstanding of what this documentation was. The reason they say there is a false shipper is there are people who are registered exporters in Thailand who can prepare export documentation. Mr Tomson used one of these people. He is not a false shipper; he is a fellow who is entitled to produce a commercial document to cover a transaction to Australia. Also, he made an application in accordance with Thai law to the Bank of Thailand to register the foreign exchange transaction. There is only one shipment; one transaction. Customs have taken this application for the foreign exchange transaction and added it to the value of the invoice to Australia and said, ‘We’ve got evidence of two payments.’

My concentration these days is on questions of dumping and subsidy, but I do understand customs valuation principles. You have to look at the nuts and bolts of the things, and that is why I have laid out in here in some simplistic form a flow chart of each transaction so that it will give you, as you asked for, a comic book approach to what is happening. The point here is that I cannot understand that, where they have an application for a foreign exchange transaction and the amount is in US dollars and in Thai baht, which is required by the Thai law, they can then possibly relate it and add it onto a sale of some goods to Australia in another independent document and so we have got evidence of two payments. Surely when they were in Thailand if they had made their inquiries they would have gone in and understood the Thai banking procedures, the foreign exchange transactions and what is required when you set out to export goods.

**CHAIR**—Can I interrupt you there. My understanding of Mr Gausam’s statement is that that is exactly what he did find out when he was in Thailand.

**Mr Balzary**—I do not know that, Madam Chair.

**CHAIR**—Mr Rodda?

**Mr Rodda**—I would like him to show us in his statement where he raises that issue. His statement is one of the appendices to my submission. Mr Gausam might like to take us to that part of his statement that says that. I would like to see it.

**CHAIR**—My understanding is that the evidence that Mr Grausam took showed that in fact that was the practice in Thailand.

**Mr Rodda**—What was the practice: that you prepared the export document? I did not think he said that. I thought his whole case was based on the assumption that the invoice showing a value in US dollars was a separate payment.

**CHAIR**—When he was in Thailand and taking evidence from people in Thailand, what did they tell him in that statement?

**Mr Rodda**—I do not think he even raised that question with anyone he interviewed in Thailand. In going through his statement, I cannot see that he referred to the invoice in US dollars. Even though he was interviewing the people who actually prepared the documents, he never asked them what those documents were.

**CHAIR**—Thank you.

**Mr Balzary**—I would support that. I have read the records of interview and I cannot see there where the question was put in relation to exactly what this means. Perhaps if it had been followed up the matter would have been made quite clear and this unfortunate valuation would not have occurred. That is really all I can comment on.

In relation to the other two sets of documents regarding two shipments from Hong Kong, from my examination of the documents, again the commercial invoice to Australia and the actual evidence of the money price paid was put and was presented to the court. Notwithstanding that, the Customs Service again obtained from Hong Kong customs authorities and other authorities the applications for export licence and the actual exporter's final export declaration. The values on those export licences and consequently the export declaration were considerably higher than the invoiced values to Australia.

The point at issue is that, if I look at the export licence applications made in relation to the goods that were shipped to Australia, they were made up to two weeks or so in advance, they were for different quantities and they were for different numbers of cartons, and I cannot in any way relate the applications for the export licences to the goods actually shipped to Australia. Having said that, Mr Rodda has made some inquiries with PricewaterhouseCoopers in Hong Kong following an understanding that was put to us that, in relation to export duties that are payable on apparel and such items that were exported from the then colony, there were export duties payable, and that is so.

The point at issue is that there are people within the Hong Kong Customs Service who they call 'look up book' people: if you go along with your exporter declaration, they are going to look in their book against the commodity export code to check on the minimum export price which is acceptable to the colony for the collection of its own internal duties. The price that is on those documents, of course, will bear no relationship to the actual selling price of the goods to Australia. Even though it is related to the same transaction, there will be a set of documents for Hong Kong and a set of documents for the sale of the goods that I have bought and sold to Australia. If they are of a lesser amount than the minimum price set by the Hong Kong authorities, the export licences will show higher values. The point at issue is that there are two

different transactions—one for Hong Kong and one for Australia. The Australian values are low and never the twain shall meet. Not only can I not relate the values; I cannot correlate the quantities—there is not a snowball's chance in Hades of me relating these quantities on the export licences to the quantities on the invoice. The Customs Service took the values declared on those export documents and said that that was the customs value of the goods.

**CHAIR**—And that was the averment? That was averred?

**Mr Balzary**—I believe so.

**Mr Rodda**—Yes, there were averments about documents obtained overseas, but they did not actually say. I have the Gold Vincent and Co. one open in front of me at the moment.

**CHAIR**—Was the value on the export document the averred value?

**Mr Rodda**—Yes, it was averred. For the Gold Vincent case for 233(1)(a) they were averments No. 8 and No. 9.

**Mr Balzary**—There is an important point here, Mr Murphy, and it is just that you need to dig further than the surface. My bundle 4 has an outline of the transaction accompanied by a flowchart of the transaction. If I could take you to point 13 of the Gold Vincent and Co. Hong Kong outline of transaction.

**Mr MURPHY**—I do not have the flowchart.

**CHAIR**—We are just going to get it.

**Mr Balzary**—The flowchart will show you in simple terms how this commercial transaction worked. Regarding my outline of the transaction, I read the record of interview that the Customs Service held with Gold Vincent and Co. in Hong Kong on 7 December 1989 and saw the record and the interview itself as being rather inconclusive.

I would like to take you now to pages 11 and 12 of the transcript of the interview. What I am pointing out here is that there is a difference between the value that is put on the export licences for the Hong Kong authorities and the invoiced value to Australia, and I point out the reason for it. Reading from the transcript, Mr Delmenico said:

So you put the proper value on the export declaration?

The answer was yes. Then Mr Delmenico said:

But you would put the value he gave you on the invoice?

The answer was:

Yes, but mostly

So the answer was yes. The point at issue is: if this fellow who is preparing the documents for the Hong Kong authorities had been asked why, he would have pointed out that if the minimum value of the goods that were being sold to Australia was below the minimum value required by the Hong Kong authorities for the collection of their tax on that item, he would adjust it upwards. In effect, the proper value that the man was putting on the export declaration, to my mind—

**CHAIR**—Required by Hong Kong law—

**Mr Balzary**—is meeting the norms required in Hong Kong. And that is all.

**CHAIR**—I think it is interesting to note that you are referring to Mr Delmenico's statement. When we were dealing with the preliminary part of the trial, the prosecutor said they would be calling Mr Delmenico and they would be giving evidence as to values; and of course they did not call Mr Delmenico and no evidence was given as to any of the values set out in any of the information.

**Mr Balzary**—Perhaps the Customs Service will correct me and throw some light on this, but I cannot see where they have inquired—either in Hong Kong or in Thailand—as to the procedures that are appropriate in the case of Thailand foreign exchange regulations and in the case of Hong Kong, with their export taxes and their declarations, and the relationship of those requirements to the sale of a good to Australia. All I am saying is that, if the sale of the good to Australia is 10—and it is different in Hong Kong; they require a minimum value of 12—so be it. But to accept willy-nilly some values on export licence applications—not in the way of the number of cartons or the quantities on those documents—and say they are the value of the goods shipped to Australia, which is something totally different, I must with respect express some amazement.

**CHAIR**—So you are saying that the investigation was inadequate.

**Mr Balzary**—If I had looked at this in Australia, I would certainly have asked some further questions. Secondly, I believe that the valuation decisions taken in 1992 were incorrect.

**CHAIR**—In all of this documentation that we have got in front of us, do we have the brief that was given by Customs to the prosecution—the Australian Government Solicitor? Perhaps we will ask that when Customs comes. We thank the witnesses for their testimony. We will require you to come back; we would like you to look at the documentation that has been presented today.

[11.54 a.m.]

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

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

**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**

**CHAIR**—Welcome. We have received your initial submission, two supplementary submissions and an exhibit from the Australian Customs Service. We have authorised those for publication. Are there any corrections or additions to those submissions?

**Mr Woodward**—We have no additions or corrections to the submissions. We do have an opening statement.

**CHAIR**—That would be fine.

**Mr Woodward**—Firstly, I would like to apologise for the weight of material. Two volumes relate to the transcript for the magistrate's court hearings, and I think in our submission we refer you to particular pages, which may make it somewhat easier. The other one deals with the information. The three additional volumes are in fact referred to in the submission which we have and which was referred to earlier by Mr Murphy. Secondly, given that the submission was only submitted to you earlier in the week, I want to briefly pick out the essence of the submission which we have put forward, to emphasise some points in that submission and to bring out one or two additional points which were not included in that material. I think they are all relevant.

Before I address the specifics, I think it is important to note that there is no evidence that any unfairness arose in the Tomson case as a result of the use of averments. If the committee is of the view that examining the Tomson case may assist its inquiries into averments in Customs, we believe that this should be done with reference to the whole of the transcript which we have provided to the committee and having regard to the terms of the informations as amended and the averments as proceeded with following the magistrate's rulings, which were the third volume I mentioned earlier.

I would like to deal first with Mr Rodda's allegations. Mr Rodda's allegations on behalf of Mr Tomson appear to be aimed at demonstrating that Mr Tomson was the subject of malicious prosecution. It is important for the committee to be aware that a similar submission was put to the trial magistrate in the context of the costs applications that were made by Tomson and Keomalavong. Those submissions were considered and rejected by the magistrate, and we have the references to those transcript pages.

**CHAIR**—Can we stop there for a minute. The magistrate concluded he had no power to award costs, did he not? And that was found on appeal to be wrong. It was referred back to the magistrate but he got ill.

**Mr Woodward**—We are talking about the cost application and we are saying that an allegation of malicious prosecution was put in relation to the other party, Mr Keomalavong, and that the submissions were considered and rejected by the magistrate.

**CHAIR**—I want to be very specific. This was in reference to a costs question, was it not? Mr Daley, you are giving the advice.

**Mr Daley**—The costs submission was rejected by the magistrate. That was made by the defence with reference to section 81 of the Justices Act—

**CHAIR**—Mr Daley, did the magistrate reject the cost application on the basis that he had no power to award costs, and was that overturned on appeal?

**Mr Daley**—No, Chair. The magistrate rejected the costs as a matter of discretion arising under section 81 of the Justices Act—

**CHAIR**—Which was subsequently overturned on appeal.

**Mr Daley**—Correct. But the magistrate's decision in relation to the application stood on the facts.

**CHAIR**—It was overturned.

**Mr Daley**—No, Chair, it was not. That is explained in the submission. Perhaps we should come to that later.

**CHAIR**—I think we can do that later.

**Mr Woodward**—The magistrate concluded, in effect, that there was nothing improper or unreasonable in the investigation and prosecution of the defendants. Again, I have referred to the pages in the transcript.

**CHAIR**—What pages were they?

**Mr Woodward**—They were pages 19 to 21 of the transcript of 27 June 1995, which is in the material you have. Against this background, I will address my points by reference—

**CHAIR**—It would be at the back here, would it? This is the volume?

**Mr Daley**—There should be two volumes of transcripts.

**CHAIR**—This one says 1994; we are talking about 1995.

**Mr Daley**—It should be the last transcript in the bundle: 27 June 1995.

**CHAIR**—But there is no indication in all the tabbing as to what is what. I have found the transcript. I think I will read it subsequently because it is quite complicated, but I would also like to see the transcript of the appeal. Have you given me that, too?

**Mr Daley**—There is a published judgment, Madam Chair. We can get that copied and provided fairly shortly.

**CHAIR**—The transcript would be good.

**Mr Daley**—I am not sure whether I have the transcript. I think there was a judgment given *ex tempore* at the conclusion of the hearing of the appeal. I am not sure whether we have the transcript; we have the judgment.

**CHAIR**—You have the transcript of everything else, so how come you do not have the appeal?

**Mr Daley**—I do not know the circumstances, Madam Chair—whether there was a transcript ordered or not. I just do not know. There would have been no need to get the transcript from the respondent's point of view, because the judge gave an *ex tempore* decision and the case was lost; that was the end of it. So there would have been no need to get the transcript. I am not sure whether the appellant ever got a copy of it.

**CHAIR**—This part that you have referred me to look at is far from clear.

**Mr Daley**—I am happy to explain it if it would assist. The defence made an application that the magistrate should order costs in their favour—

**CHAIR**—But he says that he has a discretion and refers to the act, and then he goes on to say that there are guidelines contained in that section and it could be under part A or part B but he thinks it should be under D, however the submission put to the court in that regard only related to documentary evidence. So he is saying, 'You haven't put it to me under the right sections of the guidelines,' but my understanding is that all of that was overturned, so I cannot really look at this in context without seeing the appeal judgment.

**Mr Daley**—We will obviously get that copied and provided to the committee.

**CHAIR**—I find it strange that you did not put it in when you have given me so much other stuff.

**Mr Daley**—I thought it was in there, but if it is not then we will certainly get a copy of it to you. However, I can explain—

**CHAIR**—We will leave that question in abeyance and move on.

**Mr Daley**—I am concerned that it has not been explained—it is a relatively straightforward point.

**CHAIR**—We will come back to it because it is not relatively straightforward at all from reading that.

**Mr Woodward**—I move now to the four principal allegations identified by Mr Murphy. The first allegation was that Customs officers who conducted the investigation failed to investigate the case in an impartial and objective manner. This allegation is founded on the assertion that Customs officers proceeded on the assumption that a person cannot purchase goods for a price less than the cost of production and that this affected the entire investigation. Mr Rodda seeks to persuade the committee that Mr Tomson's activities did not merit attention from Customs. Customs contends that there was a significant body of information that merited the continuing investigation of Mr Tomson's importing activities. Some of these were read out by you earlier, but I think it is important that we put them together.

By 20 August 1987, the day of the section 214 action in relation to the firm Thongson Imports and Exports, Mr Tomson had a history of noncompliance under the Customs Act and the Commerce (Trade Descriptions) Act. The submission provides details of events from 11 August 1984 until 17 August 1987 that give rise to Customs concerns and the inquiries that led to Mr Tomson's prosecution. On 7 August 1987 Customs discovered, as a result of a visit to Mr Tomson's accountant, that between January 1985 and June 1986, a period of 18 months, Mr Tomson had remitted a total of over \$196,000 that had gone overseas, whereas, between January 1984 and 10 August 1987, a period of over 3½ years, a total of 79 shipments imported by Mr Tomson had a total declared customs value of only just over \$139,000. Customs, in our view, was entitled to be suspicious about these discrepancies. In fact, between 1985 and 1987, Mr Tomson remitted a total of just over \$1 million overseas.

**CHAIR**—On 7 August 1987, when you ascertained that that amount had been sent overseas and then you counted up that \$1 million had gone overseas, which I think Mr Tomson explains was investments he had over there, had you at that stage put a value on Mr Tomson's seized goods with a declared value of \$13,000 being worth \$231,000? Had that already been done by that date?

**Mrs Grant**—I am sorry, but which date are you referring to as the starting point?

**CHAIR**—The point made in that submission is that on 7 August 1987 Customs discovered, as a result of a visit to Mr Tomson's accountant, that between 1985 and 1986 Mr Tomson had remitted \$196,000 overseas, and between January 1984 and August 1987 a total of 79 shipments imported by Mr Tomson had a total declared customs value of \$139,679. Then you go on to say that the committee would be interested to note that it was subsequently ascertained that between 1985 and 1987 a total of \$1,000,000 went overseas but he had only imported \$109,000. Does that tally with the \$139,000 above? What was the date that you ascertained that \$1 million had gone overseas and what was the date that Customs said that a \$13,000 import was in fact worth \$231,000—being the amount claimed if he was to have the goods released to him if that was the value you placed on it? What were those two dates?

**Mrs Grant**—Customs did not determine another value for the goods until 1992, I think—we were hearing the evidence earlier.



**CHAIR**—What was the offer? You said these goods were seized in 1987. They were fashion goods. Surely you are not going to tell me that you offered them back to him in 1992 at \$231,000—five years later when they would be worth zilch as they would be out of date and worthless. You are not going to tell me that, are you?

**Mr Woodward**—We will be dealing with the \$231,000 in a few minutes.

**CHAIR**—No, I would like to deal with it now, if you don't mind.

**Mr Woodward**—Okay, we will deal with it now.

**CHAIR**—What date was that done?

**Mr Woodward**—The inference from Mr Rodda's evidence is that Customs asked for \$231,000. Customs would have asked for a security. A security is a very small percentage of the \$231,000.

**CHAIR**—But that is the value you placed on them. What date did you place the value of \$231,000?

**Mr Woodward**—We are trying to find the date.

**Mr Daley**—I believe it was a date in 1990. We are trying to check the actual date.

**CHAIR**—So in all honesty, in 1990 you offered him back fashion goods seized in 1987 and said they were worth \$231,000. You have got to be kidding!

**Mr Woodward**—We said the wholesale value of them was \$231,000.

**CHAIR**—Not in 1990 it wasn't.

**Mr Woodward**—If I can go on. The \$13,000 figure that had been mentioned earlier was a figure put on the goods by Mr Tomson. That was his assessment of the value; our assessment of the value—

**CHAIR**—Mr Woodward, Customs is saying that Mr Tomson cannot really say he has lost all this money and gone bankrupt because of what Customs did because it was only \$13,000 worth of goods.

**Mr Daley**—Thirteen thousand dollars represents Mr Tomson's outlay. I think that is the point being made.

**CHAIR**—Precisely.

**Mr Daley**—It represents his outlay and he has made a turnover of about \$1 million per year—that is the discrepancy.

**CHAIR**—But we heard evidence about what it then became worth—you yourselves put a value of \$231,000 on it.

**Mr Daley**—I think they are actually two different propositions.

**CHAIR**—I do not think they are, because you are saying, ‘How come he was able to remit \$1 million between 1985 and 1987 when he only imported under \$109,000 worth of goods?’ when you are also saying that \$13,000 turned into \$231,000?

**Mr Woodward**—You actually stopped me in the midst of a point that I was making. The next sentence actually brings it out. We said that between 1985 and 1987 Mr Tomson remitted a total of \$1 million—

**CHAIR**—I just read that out to you.

**Mr Woodward**—During that period, the declared value—in other words Mr Tomson’s declared value—

**CHAIR**—Was \$109,000. I just said that.

**Mr Woodward**—was \$109,000. What we are attempting to say is that it is not unreasonable. The point I made to the committee on the last occasion was that we are trying to put ourselves back into what happened in a period where none of us were actually involved.

**CHAIR**—What I am putting to you is that when you valued \$13,000 at face value as being worth \$231,000—or even more—that is increasing it by a factor of eight? On your own figures you say that on the face value \$13,000 turns into \$231,000. Then in the next paragraph you say \$109,000 turns into \$1 million. On your figures that is perfectly reasonable.

**Mr Woodward**—The point that I am attempting to get across is that the first allegation that Mr Murphy raised was that Customs officers failed to investigate the matter in an impartial and objective manner. What I am attempting to do—and I have not got through it all yet—is to put myself in the shoes of people who are actually involved in the investigation and say, ‘Is it reasonable that they took the action they did?’ One of the points that I was wanting to make is: is it unreasonable for an officer in those circumstances—with \$1 million going out for \$109,000 worth of goods—to be suspicious?

**CHAIR**—On your own figures, yes, because you, Customs, said \$13,000 face value was in fact worth \$231,000. So it is not unreasonable to say that \$109,000 is worth \$1 million on your own figuring.

**Mr Woodward**—I think the \$231,000 relates to the total number of shipments, which were of the order of 70 or 80. The \$13,000—

**CHAIR**—You are talking here about a total number of shipments.

**Mr Vorreiter**—Those two ideas are quite unrelated.

**CHAIR**—I do not think they are.

**Mr Vorreiter**—If I may just explain. It was in 1988 when Customs discovered that \$1 million had gone overseas, purportedly to pay on a FOB basis for goods that were declared to be only about \$109,000.

**CHAIR**—No. He says that money was sent overseas for investment purposes, including a timber mill.

**Mr Vorreiter**—I am not sure whether he says that. He may have said that to you—

**CHAIR**—In evidence—sworn.

**Mr Vorreiter**—In 1988 when Customs investigators were looking at this matter they had no knowledge, if indeed that be true, that some of that money may be attributed to overseas investments.

**CHAIR**—Did they ask?

**Mr Vorreiter**—It is my understanding of the evidence—

**CHAIR**—Did Customs ask?

**Mr Vorreiter**—Customs factored that matter into their—

**CHAIR**—Did Customs ask what the purpose of the exported funds was for? If they did, where is the documentation of the ask and the answer?

**Mr Vorreiter**—Okay. The best way of answering that is to say that Customs issued 38B notices to find out more information as to the proper pricing of those goods.

**CHAIR**—Where is the outcome in the documentation? Where do I look for that?

**Mr Vorreiter**—We can produce the 38B notices if they are not already in evidence.

**CHAIR**—Are they in the documentation you have presented to us?

**Mr Vorreiter**—No.

**CHAIR**—That is a fundamental question to ask.

**Mr Vorreiter**—The question was asked—

**CHAIR**—Mr Balzary's evidence was that Customs did not ask the question about the documentation in Hong Kong or in Thailand.

**Mr MURPHY**—Madam Chair, with great respect, I am finding this very difficult to follow and it would be helpful to me if Mr Woodward were allowed to conclude his opening statement, and then we can cross-examine Mr Woodward, Mr Vorreiter, Mr Daley or Mrs Grant. I would like to hear what Mr Woodward has to say. If you think there are deficiencies in what he is saying or you want to challenge him, fine; but to hear his statement would help me in trying to work out what questions I might ask today. Again, we are drowning in evidence.

**CHAIR**—I am asking these questions because Mr Woodward is simply reading off his written submission. If it were additional information flowing generally, I would not have a problem. Please go on, Mr Woodward. I can read too.

**Mr Woodward**—What I did say was that I was attempting to crystallise it because I thought that the members of the committee may not have had the opportunity to read it in detail. That is what I have been attempting.

**Mr MURPHY**—And I have not.

**Mr Woodward**—The telegraphic transfers indicated the bulk of the funds had been remitted to overseas suppliers and the majority of the cheque butts relating to these remittances were endorsed payment for goods. There is no evidence to support Mr Rodda's submissions that Customs' continuing interest in Mr Tomson was unmerited. The multilayer decision-making process within Customs in relation to section 214 action and the fact that at first the recommendation to take such action was not approved demonstrate in Customs' view an appropriately objective approach.

**CHAIR**—Do you think five years is timely?

**Mr Woodward**—I never think a period of that length is satisfactory for anything—but we are looking retrospectively.

**CHAIR**—Isn't that paragraph meant to justify that?

**Mr Woodward**—I am not sure that the five years is relevant to the point which I was attempting to make, which is to deal with the first allegation that Mr Rodda made and that Mr Murphy asked me to pursue.

**CHAIR**—The only reason I am raising that question is: don't you think Mr Joe Blow in the street would think it was perfectly unreasonable to have seizure in 1987 and to bring an action in 1992? To me this paragraph is attempting to justify that.

**Mr Woodward**—I do not think it is. We are saying that in fact there was a layered approach. There were a whole series of checks and balances, which for someone like us looking back at what happened then seemed to be appropriate.

**CHAIR**—Has it now taken five years?

**Mr Woodward**—What I would like to do if I can is to complete what I am saying and deal with the five-year issue because obviously a lot happened in that five-year period. It was not as if five years went by without anything happening; a lot happened.

Suspicious regarding Mr Tomson's activities were first referred to the investigation section in June 1987. The investigation section initially declined to investigate the matter and recommended section 38 notices be issued. The investigation section examined a second referral on 14 August 1987 and subsequently undertook an investigation. Customs initially raised this case with the AGS. It was the AGS which suggested the matter be referred first to the DPP for consideration of criminal proceedings under the Crimes Act.

**CHAIR**—What was that date?

**Mr Woodward**—It was in 1988. We can get the precise date for you.

**CHAIR**—So AGS recommended action be taken in 1988?

**Mr Daley**—AGS advised that it should be sent to the DPP, rather than them look at it.

**Mr Woodward**—What I now have to say will be about the interface between us and the DPP. Thereafter, Customs sought ongoing advice from the DPP. The DPP provided either written or oral advice on five occasions between 13 September 1987 and 11 December 1990. Accordingly, it can be seen that advice was sought by Customs in respect of critical decisions during the investigation phase of the case. The involvement of the DPP during this phase provided an independent and objective check on the process.

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

**CHAIR**—Can you confirm that date?

**Mr Woodward**—It was 11 December 1990. In due course, both AGS and independent counsel, now senior counsel, advised Customs that a prima facie case existed for offences under the Customs Act in relation to five of the shipments.

**CHAIR**—Who was the counsel who advised that?

**Mr Woodward**—Mr Johnson.

**CHAIR**—At the New South Wales bar?

**Mr Woodward**—Yes. The second allegation is that Customs ignored evidence that Mr Tomson was innocent. In answer to Mr Murphy's request for a concise explanation of this allegation, Mr Rodda referred first to Mr Grausam's statement and suggested that Customs did not give due regard to answers given by overseas suppliers to Mr Grausam's questions and that this evidence was ignored when the matter went to trial. At the time of making that submission

Mr Rodda was not able to identify any relevant parts of the statement for the committee. The short answer to this allegation is that the Grausam statement was included in the brief to the AGS and in the brief to counsel. Both AGS and counsel nevertheless concluded that a prima facie case existed. Secondly, the only reason that those parts of the Grausam statement that set out conversations with overseas suppliers were not tendered was that they were not in admissible form and that is shown in the transcript of 26 July 1993, pages 28 to 30.

**CHAIR**—Did Mr Johnson give a written opinion?

**Mr Daley**—He gave at least one written opinion.

**CHAIR**—Is that contained in this documentation?

**Mr Woodward**—No, it is not.

**CHAIR**—Could we have a copy of that opinion?

**Mr Woodward**—There is a privileged aspect and I would like to take advice on that.

**CHAIR**—What is the privileged aspect?

**Mr Daley**—It is legally professionally privileged. It is advice given by a legal adviser to a client. It would ordinarily be legally privileged and Mr Woodward wishes to seek his own advice about that.

**CHAIR**—But you are the client.

**Mr Daley**—No, I am the solicitor.

**Mr Woodward**—I am the client.

**CHAIR**—I beg your pardon; Mr Woodward is the client.

**Mr Woodward**—I am not trying to hide. I would just like to seek a piece of advice. My view is I would rather be open because I do not think we have anything to hide in any of this so there is no suggestion of that. Unless there was some reason why we would not do it, we will provide it to you.

**CHAIR**—This is not a personal thing, Mr Woodward. It all predates you anyway.

**Mr Daley**—I should say we do not have that material at the moment. It is with Mr Bellew.

**CHAIR**—You came on the scene subsequently. This is pre you, as it were.

**Mr Daley**—That material is with Mr Bellew at the moment, which is why we do not have it.

**CHAIR**—He still has it?

**Mr Daley**—Yes. There is a lot of material.

**CHAIR**—Why is that?

**Mr Woodward**—We told you on the last occasion that we had extended Mr Bellew's work to look at every aspect of what Customs has done in this and we are parading a whole series of files, papers and AGS material to him as well. To reinforce the point that I made at the beginning of the last hearing: if there is anything wrong in what we have done, we will fix it.

**CHAIR**—Mr Murphy is very keen on mediation. But wouldn't it be fair to let Mr Rodda and Mr Tomson have all the material that you have given to Mr Bellew?

**Mr Vorreiter**—Why would it be fair?

**Mr Daley**—There are many folders, but I am not quite sure why that would follow.

**CHAIR**—Pardon my cynicism, but I am always a wee bit concerned about internal investigations; I think they lack a certain transparency.

**Mr Daley**—Mr Bellew is not a member of Customs; he is a member of the bar.

**CHAIR**—But it is still internal.

**Mr Daley**—No. He is engaged by Customs to give independent advice. He is external to the process; he is independent.

**Mr CADMAN**—You would have done a judicial inquiry if you were going to do it externally.

**Mr Daley**—If there was something to merit that, then of course we would.

**CHAIR**—Anyway, I think it would be fair if all the information were made available—and to this committee too. In fact, that might be the better thing to ask for. Could all that information be made available to us? We are drowning in this much paper; we may as well drown a bit more and we can really go through it thoroughly.

**Mr Daley**—There are many, many volumes more; I can assure you of that.

**CHAIR**—Not nearly as much as we had in Midford, and we managed then.

**Mr Daley**—This is quite a different case to that of course.

**CHAIR**—Not entirely. There are a lot of similarities.

**Mr Woodward**—That is something the committee would obviously want to consider. I listened this morning to the members talking about the amount of material. This is potentially many, many times the amount of material—

**Mr CADMAN**—I was complaining about the lateness, Mr Woodward—and you are aware of that.

**CHAIR**—Only Mr Murphy complained about the volume.

**Mr MURPHY**—I do not want to be verbally by you, Madam Chair. I was not complaining about the volume per se; I was complaining about the volume in that I had just received it all this morning—impossible. The fact is that you felt the same, as did Mr Cadman. Spare us now another 10 volumes of paperwork.

**CHAIR**—No, I am sorry; I want the volumes. Will we take a vote on it?

**Mr CADMAN**—No. The volume is okay; the timeliness is the factor.

**Mr MURPHY**—This is even more indicative of the need for mediation in this case.

**CHAIR**—We are not in the mediation business; we are a committee.

**Mr MURPHY**—And the Tomson case is just one element of this inquiry.

**CHAIR**—Mr Woodward, I formally request that you make available to us all the information that has been given to Mr Bellew. Will you be forthcoming with that information?

**Mr Woodward**—I note what you have said. We will comply with the committee's request.

**CHAIR**—Thank you very much. Please go on.

**Mr Woodward**—In the event, there was no need for Mr Grausam to give evidence to source the overseas documents because these are admitted without objection. The most critical point is that the prosecution did serve the Grausam statement on the defendants. Contrary to Mr Rodda's submission, this was done on the day prior to Mr Grausam being called. Nevertheless, the defendants' counsel did not seek to cross-examine Mr Grausam on any parts of the statement dealing with the overseas investigations.

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

**CHAIR**—Are you going to read the whole of that out?

**Mr Woodward**—I am not reading the whole of it out; I am pulling out the things that I regard as quite important. If I am allowed to continue, I can probably complete it in about seven minutes.

**CHAIR**—We will break for lunch now and come back at 2 o'clock, when we will go back to this point. I have another appointment in the interim, but people might take this opportunity to read the document, which will be helpful.



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**Proceedings suspended from 12.29 p.m. to 2.01 p.m.**

**CHAIR**—We will resume with Mr Woodward, who is speaking to the statement we received in the last 48 hours.

**Mr Woodward**—If my recollection is right, when we finished for the luncheon adjournment, I had mentioned a query from Mr Murphy and Mr Rodda having referred to a minute from Customs officer Delmenico that clothing could be purchased at certain times of the year by the kilo and that this suggested it could be purchased at a very low price. The point I was about to make was that Customs submits that whether or not clothing could be purchased by the kilo is not relevant in this case. The important thing to note is that Mr Tomson imported all the year round and his invoices were lodged with entries for home consumption. In the cases before the court all showed prices per garment, not per kilo. Hence, irrespective of whether clothing could be purchased by weight in South-East Asia, that did not occur in this case.

**CHAIR**—For my benefit: you referred to commercial invoices that were lodged with the entries and purchased by number.

**Mr Woodward**—In effect, that is the supporting commercial information.

**CHAIR**—No. Could you tell me precisely what documents they were? In the case of Hong Kong, for instance, were they both the export licence application and the value for home entry? Are there both documents?

**Mrs Grant**—The documents that were lodged with the Customs entry were the invoices that Mr Tomson received with his goods from the companies—that is, these export agents that have been referred to.

**CHAIR**—Did that include the application for the export licence in the case of Hong Kong?

**Mrs Grant**—No. The export licence is not the document that was used to support the Customs entry.

**CHAIR**—That is not what I am asking. Did it include that document?

**Mrs Grant**—No, it did not.

**CHAIR**—Thank you.

**Mr Woodward**—Will I continue?

**CHAIR**—Yes. Could you tell me if you intend to read out all 26 pages or just some?

**Mr Woodward**—No. I said I am picking out the essence, and there are a couple of extra points that I think are quite important. I am trying to put our points into perspective. A further demonstration of the integrity of the process can be found in the conduct of the prosecution itself. Mr Tomson was represented by experienced counsel—a former magistrate—and a reading

of the transcript demonstrates that Mr Tomson's counsel made all of the usual objections and concessions that are appropriately made in the conduct of any prosecution case.

**CHAIR**—Could you just confirm for me at that point that, when the prosecution opened its case, it did state that it would be calling evidence from both Mr Grausam and Mr Delmenico and that they are on the witness list? Would you just confirm that?

**Mr Daley**—Originally it was intended to call all the witnesses.

**CHAIR**—Were they on the list that was published? Did he in fact say that he called?

**Mr Daley**—No. I am trying to answer the question as best I can.

**CHAIR**—Just the one I asked.

**Mr Daley**—I hope I will answer what you asked. Originally Customs intended to formally prove every matter. They understood that they would have to because Mr Tomson was not represented; therefore, both Mr Delmenico and Mr Grausam were on the witness list. In the event, there was consent to the tendering of the overseas documents and it was made quite clear by the prosecution that they would not be calling Mr Grausam to give evidence in relation to what occurred overseas, and there was no objection to that.

**CHAIR**—Where did that occur?

**Mr Daley**—It is in the transcript.

**CHAIR**—Where?

**Mr Daley**—It was on 26 and 27 July. I can take you to those.

**CHAIR**—Page? Was this in 1993, 1994 or 1995?

**Mr Daley**—It was in 1993. It starts on page 8 of the transcript of 26 July. It is picked up again on page 11. It is dealt with on pages 28 and 29, and then it goes over again on 27 July, on page 40.

**CHAIR**—I am on page 8 now. Which paragraph are we looking at?

**Mr Daley**—The paragraph that deals with Mr Johnson saying that much of the Grausam statement was inadmissible. It followed from that what was intended was to simply tender the documents and have Grausam give oral evidence to cover those matters. There was no need to tender the statement.

**CHAIR**—But there was contention about the validity of the documents. The averment that was made said that the documents were false in the particular.

**Mr Daley**—Yes.

**CHAIR**—The defence were very happy to have the documents in evidence because they said they were accurate and correct. That is where the disagreement is.

**Mr Vorreiter**—Mr Rodda said today that the documents that were lodged with the entry were non-contentious, and that is why they were happy for them to be admitted into evidence.

**CHAIR**—That was point No. 1.

**Mr Vorreiter**—But that does not apply to the overseas documents.

**CHAIR**—No. Mr Rodda gave evidence today, very specifically, that the overseas documents, which were in the pile of documents handed to him the day before or the day of the hearing, contained the overseas documents. He was very happy to have those documents in because averments 4, 5 and 6 said that they are false in the particular. I will go back and find where it is.

**Mr Vorreiter**—I think you will find that a proper understanding of what Mr Rodda has said today is not that, in fact.

**CHAIR**—We will recall Mr Rodda and ask him.

**Mr Vorreiter**—Perhaps he needs to be recalled.

[2.08 p.m.]

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

**CHAIR**—Mr Rodda, there seems to be some conflict about the evidence you gave this morning. Would you like to tell us whether my interpretation is right or wrong: with regard to 4, 5 and 6—particularly 4 and 5—of the averments, you were perfectly happy to have the overseas documents as part of the evidence because you believed them to be true whereas the averment says they are false.

**Mr Rodda**—That is correct.

**CHAIR**—Would you like to say that in your own words so that Mr Vorreiter understands that.

**Mr Rodda**—Mr Tomson's position was that we had no objection to any of the material tendered by the prosecution going into evidence for the simple reason that I was quite happy that Mr Tomson was innocent of any wrongdoing. I did not believe that anything that would be put into evidence by the prosecution would show otherwise.

**CHAIR**—Thank you. So we now understand that is the position.

**Mr Vorreiter**—In any event, those documents went in by consent, and that was the concession—

**CHAIR**—Nobody is disagreeing with that, but there was no evidence called about them. It is important to mention at this stage that Mr Murphy gave you gentlemen from Customs a copy of Mr Rodda's submission given this morning.

**Mr Woodward**—We had a look at it for a couple of seconds and then handed it back virtually immediately.

**CHAIR**—That is good, because I think it is fair that you both get to read each other's submissions so that when we come back on another day we can have it. I just thought it was a bit strange.

**Mr Daley**—As I understood it, the question addressed to me was whether or not Grausam and Delmenico were promised to be called and then were not called. My answer was simply to try and explain that that was done by consent. It was agreed; it was quite out in the open. I had not quite finished my answer. I gave a number of transcript pages. The final and most relevant is page 40 and relates to 27 July, which was the second day of the trial. Mr Johnson said:

[JOHNSON]: As I understand it your Worship there is no issue taken concerning the admissibility of those documents, they are already in evidence in any event. In those circumstances I would not propose to seek to lead any evidence of various conversations etcetera that occurred overseas and I understand that to be [their] position. There is no issue as to—

Then defence counsel says, 'No your Worship.' In other words, he agreed with it. That was the basis upon which Grausam did not give evidence about those overseas investigations and those overseas documents.

**CHAIR**—Correct. But you did not call Mr Domenico.

**Mr Daley**—Quite. For that reason.

**Mr Vorreiter**—There was no need to.

**Mr Daley**—There was no need to. The documents were admitted and there was no need to lead evidence from them. That was not objected to. The documents went in on that basis. That is the point I was seeking to make.

**Mr Rodda**—I very respectfully dispute that version of the facts. If you look at the earlier part of the transcript before the documents were tendered at all, you will see that Mr Johnson advised the court that Mr Grausam would be leading evidence about those documents. It was on that basis that we agreed to the tender without objection.

**CHAIR**—What page of the evidence is that?

**Mr Rodda**—It was very early. I think it is at around page 8.

**CHAIR**—Of that date?

**Mr Rodda**—Of the transcript of the same date. It was very early, before the documents were even tendered. I am relying on my memory; it might have been page 6.

**Mr CADMAN**—I just read that. I think it is probably on the first day.

**Mr Rodda**—It was the first day, and very early.

**Mr Daley**—The passage I have read is on the second day, and that is the way the matter proceeded. So it does not matter what happened on the first day, with all respect.

**Mr Rodda**—Of course it matters what happened on the first day.

**CHAIR**—Of course it matters. I am not going to accept that.

**Mr Daley**—The trial proceeded on the basis of the concessions made. I have just read out the passage that makes it very clear what happened. I do not see how that can be argued with.

**Mr Rodda**—Get the events in sequence and you might understand what happened.

**Mr Vorreiter**—The important point is that, as the hearing progressed, there was a concession by the defence that it was not necessary to call Mr Delmenico. It proceeded from that point on.

**CHAIR**—Where is that concession?

**Mr Vorreiter**—Mr Daley has just pointed it out to you.

**CHAIR**—No, he did not say that. He was talking about Mr Grausam.

**Mr Daley**—The point stands for both witnesses, Madam Chair.

**CHAIR**—Does it? Why?

**Mr Daley**—Because they are both related to the same topic: the overseas documents and the overseas investigations.

**CHAIR**—You knew that, but did the defence know that? You said Mr Delmenico—

**Mr Daley**—Mr Parnell, who was defence counsel, accepted that.

**CHAIR**—You said you were going to call Mr Delmenico. That was accepted and then you did not call him. All you have talked about in this transcript is Mr Grausam—and you and I were not there, were we?

**Mr Daley**—That is quite so, and we can be objective about what happened. When you read the transcript it is quite clear—

**CHAIR**—We are both engaging in hindsight here. You were there, Mr Rodda, were you not?

**Mr Rodda**—Yes.

**CHAIR**—Was anybody else now at the table involved at that time?

**Mr Rodda**—No.

**Mr Vorreiter**—No.

**CHAIR**—Only Mr Rodda?

**Mr Daley**—Madam Chair, the simple point is that on 27 July Mr Johnson explained why there was no need to call Grausam to give evidence. The same proposition would apply to Mr Delmenico. The evidence would have covered the same issue.

**CHAIR**—That is a leap I do not accept.

**Mr Daley**—I do not understand. What is the difference between the two witnesses' evidence?

**CHAIR**—It is called Grausam and Delmenico, and Mr Delmenico was on the list. We heard evidence from Mr Rodda that Mr Delmenico was going to be called. I accept that in good faith as he was the only person who was there at the time.

**Mr Vorreiter**—Mr Tomson was represented by experienced counsel. If counsel accepted—

**CHAIR**—When was counsel engaged?

**Mr Vorreiter**—Madam Chair, please let me continue.

**Mr Rodda**—About a week before the trial.

**CHAIR**—How many conferences did you have?

**Mr Rodda**—Probably three or four. I do not recall now. There were several. It was an enormous case to get across.

**CHAIR**—Was there discussion about those overseas documents?

**Mr Rodda**—No. At that stage we did not even know there were any.

**CHAIR**—So you did not know that there were any overseas documents. When did you first know that there were overseas documents?

**Mr Rodda**—On the morning that the case briefs were handed to us by the prosecutor.

**CHAIR**—So, on the morning of the trial—a bit like we here, struggling to get through all of this—you were handed that—

**Mr Rodda**—That is correct.

**CHAIR**—and you expected Mr Delmenico to be called—

**Mr Rodda**—Yes—and Mr Grausam.

**CHAIR**—Mr Grausam was called.

**Mr Rodda**—No—to give evidence about the overseas documents. It was on the basis of Mr Johnson's—I will not say an undertaking—statement to the court in his opening address that Mr Grausam would be called to give evidence about the overseas documents that we made the concession that they would be admitted without objection.

**CHAIR**—It says in the court transcript:

JOHNSTON: As I understand it your Worship there is no issue taken concerning the admissibility of those documents—

that is correct—

they are already in evidence in any event. In those circumstances I would not propose to seek to lead any evidence of various conversations etcetera that occurred overseas and I understand that to be their position, there is no issue as to—

PARNELL: No your Worship.

JOHNSTON: In those circumstances your Worship that the evidence in chief of the witness perhaps I should tender the samples which the witness has referred to. They are many in number, I would tender them as the witness has referred to them your Worship.

**Mr Daley**—That goes to the question of tendering samples of clothing. It is the first part that I referred to that deals with overseas documents.

**CHAIR**—I know, but I am interested in ‘lead any evidence of various conversations et cetera that occurred overseas’. I think that is a bit vague.

**Mr Rodda**—I think that is a reference to Mr Grausam’s statement, which was handed to us on that particular day but not put into evidence.

**CHAIR**—In other words, you are saying that that sentence relates to Mr Grausam’s statement that he would not call evidence of various conversations but that that did not relate to the documents.

**Mr Rodda**—That is correct.

**CHAIR**—I think that is a fair interpretation.

**Mr Vorreiter**—A point to make here, though, is that this hearing ran from the middle of 1993 until 1995—

**CHAIR**—I am aware of that.

**Mr Vorreiter**—over various sitting days because of the way in which the local court in New South Wales organised its hearing times.

**CHAIR**—But this is only the second day of four hearings in July 1993.

**Mr Vorreiter**—Quite. Therefore, having regard to the fact that Mr Parnell, an experienced counsel, was representing Mr Tomson—

**CHAIR**—Which Customs, I think, did not expect; I think Mr Johnson said that.

**Mr Vorreiter**—Because Mr Parnell was an experienced counsel, he would have had ample opportunity during that hearing, over that extended period of time, to, for example, ask Customs to call Mr Delmenico, if that were considered to be important, but no such application was ever made.

**CHAIR**—But he had said that he was calling Mr Delmenico. Page 40 relates only to Mr Grausam, his statement and his various conversations et cetera, not the documents.



**Mr Vorreiter**—But if the defence had thought it important that any witness at all on the Crown side of the case be called for the defence, an application could have been made.

**CHAIR**—That is precisely what Mr Rodda was saying. They were under the impression that they would call Mr Delmenico. He was there and you were not.

**Mr Vorreiter**—Even if he had that impression on the second day of the hearing, he could not have had that impression by 1994 and 1995.

**CHAIR**—But there were two more days. At what point did you ask for the case to be dismissed because the case had not been proven?

**Mr Rodda**—At the close of the Crown's case. I forget when it was.

**Mr Vorreiter**—It was in 1994.

**Mr Rodda**—It would have been in 1994, yes.

**CHAIR**—At that stage did you still expect Mr Delmenico to be called?

**Mr Rodda**—Yes, in fact when Mr Grausam was not asked any questions about the documents that were obtained overseas—

**CHAIR**—So was Mr Grausam called only in 1994?

**Mr Rodda**—No, I think he was called before the adjournment. I would need to check the transcript for that.

**Mr Vorreiter**—In fact, he was called in 1993 and again in 1994.

**CHAIR**—The conclusion of his evidence was in 1994?

**Mr Vorreiter**—That is correct.

**CHAIR**—The next witness to be called, you would have thought, would have been Mr Delmenico?

**Mr Rodda**—That is correct. We thought he would have been the next witness called.

**CHAIR**—And there was no indication that he would not be called?

**Mr Rodda**—That is correct.

**Mr Vorreiter**—In 1994 there were four hearing days—18, 19, 20 and 21 April. Frankly, it beggars belief that the defence could have been under the impression that Mr Delmenico was about to be called.

**CHAIR**—Why?

**Mr Vorreiter**—Because the case proceeded on the basis that he was not going to be.

**CHAIR**—No, it was not. Where in the transcript does it say that Mr Delmenico will not be called.

**Mr Daley**—It would have been relevant for his evidence to have been called in relation to the proving of the overseas documents—

**CHAIR**—No.

**Mr Daley**—I cannot answer unless I am allowed to.

**CHAIR**—Where does it say in here that Mr Delmenico was not to be called?

**Mr Vorreiter**—That is not really the point.

**CHAIR**—Where does it say it?

**Mr Vorreiter**—Madam Chair, that is not the point.

**CHAIR**—Does it say it in any of the transcript that Mr Delmenico will not be called?

**Mr Vorreiter**—It may or may not. I do not know. Sometimes it can just be the subject of a conversation—

**CHAIR**—Hang on.

**Mr Vorreiter**—The Crown will often indicate to a defence representative that a witness may or may not be called. That is not necessarily recorded in the transcript.

**CHAIR**—Okay.

**Mr Vorreiter**—Madam Chair, can I just say this: if the defence were expecting Delmenico to be called—

**CHAIR**—These are Mr Johnson's opening remarks:

We had a number of folders prepared. We did not know until this morning that the defendants were to be represented, the application of course having been made before your Worship a week and a half ago and we had folders prepared which we have provided to my friend, which contain documents that we propose to tender and they contain summary documents which may assist your Worship. We did propose in fact to tender the folders if need be and have put to strict proof, there will be a large number of witnesses called in relation to the documents. If not put to strict proof the documents can be received by your Worship in the book fashion. But perhaps for present purposes if I can merely extract from the folders what is a summary document and hand these up to your Worship.

So that is a clear statement of there being lots of witnesses. Where in here does it say there is a witness list? We go on and we get to—

**Mr Daley**—The point about that is that the Crown were not put to strict proof in relation to the overseas documents; therefore, they did not need to call the witnesses Grausam or Delmenico. That is the point we are seeking to make.

**CHAIR**—I do not accept that. The documents were admitted as evidence. That is all.

**Mr Daley**—There was no issue about their being admitted. There was no need to formally prove them through Mr Delmenico or Mr Grausam.

**CHAIR**—No, there was not because they were averred to.

**Mr Daley**—No, because they were admitted—

**CHAIR**—Yes.

**Mr Daley**—by consent. That was how they went into evidence.

**CHAIR**—The documents were admitted but the contention about them was different. The prosecution said, ‘They are false in the particular.’ The defence said—

**Mr Daley**—The prosecution called evidence in relation to that.

**CHAIR**—‘They are true and honest documents. We are happy to have them in evidence.’ But the averment said, ‘They are false in the particular’ and that has to be believed as a prima facie case.

**Mr Daley**—No, Madam Chair.

**CHAIR**—Yes.

**Mr Daley**—There was evidence led in relation to price. The evidence of Prelea—

**CHAIR**—No, it was not. It was evidence led with regard to the cost of manufacturing.

**Mr Vorreiter**—No.

**Mr Daley**—No, it was led as to value. It was quite clear that the prosecution disputed the genuineness of the prices in the invoices. The case was opened on that basis.

**CHAIR**—Correct.

**Mr Daley**—Evidence was led from Prelea to go to that very point and that is the basis upon which the magistrate ruled. I am happy to take the committee to that part of the transcript.

**CHAIR**—Mr Prelea—I was reading this at lunch time—was a competitor and complainant. Is it still the practice of Customs to call someone who is a major complainant as a so-called expert witness. Is that still the practice?

**Mr Daley**—I am not aware that that is the practice at all.

**CHAIR**—So you do not do that now?

**Mr Daley**—I am not aware that it was ever done as a matter of practice.

**CHAIR**—It says in your submission that Mr Prelea had complained.

**Mr Daley**—Yes, but that does not mean it is a matter of practice within Customs to always use a complainant.

**CHAIR**—I asked you: does it happen now?

**Mr Daley**—And I said, no it does not—not that I am aware of. But I am also not aware that it was ever a practice.

**CHAIR**—You said he was a complainant and he was called as an expert witness.

**Mr Vorreiter**—We did not say he was a complainant. That is your assertion that he is a complainant.

**Mr Daley**—Perhaps we are at cross purposes. I thought you were saying that Customs had a practice of calling complainants, and I was simply saying I am not aware that that was ever a practice of Customs.

**CHAIR**—I am asking the question: do you do it now? Does it happen now?

**Mr Daley**—Not that I am aware of. It may in some cases happen because there is no-one else to call—because it is not possible to get other witnesses to give evidence. That is a possibility.

**CHAIR**—So there would be absolutely nobody else in Australia who could have given evidence about value? Indeed, another witness did give evidence and the magistrate believed him and not Mr Prelea.

**Mr Daley**—That is always the risk that you take. That is what happens in the court. That is why it is a fair process at the end of the day. That is part of the integrity of the process.

**CHAIR**—Really?

**Mr Daley**—You put your evidence before the magistrate and you see how the magistrate rules.

**CHAIR**—This is a process of integrity begun in 1987, where the prosecution finishes in 1995. Do you think that is reasonable? Nothing is brought until 1992 and from 1987 until 1990 there is an attempt to get a case to be brought perpetually. That is just?

**Mr Vorreiter**—It depends on the complexity of the case.

**CHAIR**—In the meantime you have made it known to the importer that you are going to seize every shipload of goods that comes in. Do you think that is fair?

**Mr Daley**—We can address this in more detail during the afternoon. The fact is that, in the statute, parliament allows five years to bring the prosecutions. This was a complex matter and investigations occurred and advice was given throughout that period and the cases were commenced within time. Parliament allowed that through the statute.

**CHAIR**—How close was it to the five-year limit?

**Mr Daley**—It was quite close to the end. There is no question of that.

**Mr CADMAN**—Just as a matter of record, I would like to point your attention to page 6 of your most recent submission where you refer to Mr Prelea as an expert witness.

**Mr Daley**—That is the basis on which he was called.

**Mr Woodward**—Am I going to be able to finish off? I am able to shorthand. I know that you are anxious that I do not re-read.

**CHAIR**—If I really have to sit here and listen to 26 pages being read out, I am going to get very cranky.

**Mr Woodward**—I am going to skip the points made. I had not realised that you would have had time to digest the submission that we had prepared. I have erred in attempting to re-cover some of the points. Parts that I was going to include in my opening statement are covered in pages 16 to 22 of the submission. Is it now possible for us to have our team here and Mr Rodda—

**CHAIR**—I think Mr Rodda can stay.

**Mr Woodward**—During the last hearing much was said about a number of issues which Customs has addressed in a supplementary submission, so there is quite a lot of information in it. There are some matters that I do want to highlight for the committee. With respect to financial position and bankruptcy, we submit that Mr Rodda has made no nexus between any action that had been undertaken by Customs and the state of Mr Tomson's finances. Mr Rodda's submission of 20 April on page 2 states:

Mr Tomson was destitute by the end of 1990.

This would seem to be at odds with Mr Tomson's ability to travel overseas at that time. Mr and Mrs Tomson had numerous overseas trips between 1990 and 1993. It is particularly interesting to

note that, within six to seven weeks of Mr Rodda seeking assistance with legal aid for Mr Tomson's defence in July 1993, Mr Tomson travelled overseas in late August for six weeks. As mentioned earlier in the hearings it is difficult to accept that a man with an annual turnover of \$1 million could be ruined by the detention of goods worth \$13,000, on his own valuation. We had discussion on that this morning.

**CHAIR**—I think that is a bit disingenuous.

**Mr Woodward**—Similarly, the security required by Customs did not require the payment of \$240,000, it required only the payment of a bank fee for providing the guarantee which was probably of the order of a couple of thousand dollars a year.

**CHAIR**—That is the point I do want to follow up. These goods were seized in 1987.

**Mr Vorreiter**—They were actually seized in 1988.

**CHAIR**—Even a chap would know that fashion goods that are fashionable in 1998 are no longer fashionable in 1993.

**Mr Vorreiter**—The point is that they were still sought in 1990. Mr Tomson still sought the return of the goods in 1990.

**CHAIR**—Mr Rodda, is that true?

**Mr Rodda**—I think we abandoned attempts to get them back in 1988.

**Mr Vorreiter**—Except that a law firm, Marsdens, which represented Mr Tomson, in 1991 wrote to Customs and asked that the period in relation to the notice under what is called section 208A be waived so that they could commence proceedings for the return of the goods. That is a communication that was made on Mr Tomson's behalf.

**CHAIR**—What does 208 say?

**Mr Vorreiter**—The 208A notice is the notice that requires a person from whom goods are seized and where those goods are claimed to bring proceedings for the recovery of the goods within a period of four months. It is a provision that no longer exists in the act, but it was in the act at the time.

**CHAIR**—He asked for a waiver so that he could ask for the goods back?

**Mr Vorreiter**—He asked for a waiver of that four-month period so that he could bring proceedings—that is, proceedings in a court of competent jurisdiction—for the return of the goods.

**CHAIR**—And that is in 1990?

**Mr Vorreiter**—That is in early 1991.

**Mrs Grant**—On 14 June 1989, Customs advised of the Collector’s decision to allow the release of the goods on security.

**CHAIR**—And the security was to be in the sum of?

**Mrs Grant**—The security for the four shipments that were in the name of Thongson Imports was almost \$155,000.

**CHAIR**—What was the value of that shipment on the face of the documentation?

**Mrs Grant**—That was the four shipments that were worth \$13,000, according to the Customs entering value.

**CHAIR**—That is Mr Tomson’s valuation?

**Mrs Grant**—That is correct.

**CHAIR**—For \$13,000 of importation you wanted a security of \$155,000?

**Mrs Grant**—I think we should make it clear that the security amount is not the amount that we consider to be the Customs value of those goods?

**CHAIR**—What do you think it is?

**Mrs Grant**—That is an amount of security that we need. Once the goods are released back to the importer, the importer would have then been able to trade with those goods; but, if at the end of proceedings those goods had been considered forfeit to the Crown, we would then draw on the bank security. Instead of having the goods, we would have the value of the security.

**CHAIR**—You put a value on those goods of \$155,000 because that is what you wanted back if he were found guilty?

**Mr Vorreiter**—On the assumption that they were returned to him on security.

**CHAIR**—He says it is worth \$13,000. You say you can have them back but there has to be a security for \$155,000. If he is found guilty and has been trading the goods, you want \$155,000.

**Mr Vorreiter**—The \$13,000 is just a free on board value estimated by Mr Tomson.

**CHAIR**—No. In your other evidence you said that no nexus has been made by Mr Rodda that Mr Tomson could be ruined by a \$13,000 seizure. To put it mildly, that is pretty disingenuous when your own valuation is \$155,000.

**Mr Vorreiter**—That is an entirely different basis of evaluation.

**CHAIR**—Correct.

**Mr Vorreiter**—The security provisions of the act proceed on the assumption that the goods are forfeited to the Crown. If someone seeks their return, they have to pay the value of those goods, which includes not just the original, true free on board value but also duty and sales tax components and then a profit component. That is why the figure increases.

**CHAIR**—You just said it out of your own mouth that it includes a profit component. So, in your view, the value of those goods in terms of a profitable enterprise for Mr Tomson is \$155,000.

**Mr Vorreiter**—I repeat: the security provisions of the act proceed on the assumption that the goods, because they have been seized as forfeited to the Crown, belong to the Crown. If those goods are returned—

**CHAIR**—I am not talking about that. I am talking about the value Customs put on the goods. On the one hand you have read out of your own submission ‘How can Mr Tomson say that Customs have done this dreadful thing to him with a \$13,000 seizure?’ and, on the other hand, your own valuation is \$155,000.

**Mr Vorreiter**—But the cost to Mr Tomson was only \$13,000, according to him.

**CHAIR**—But it is a loss of profits, for heaven’s sake.

**Mr Vorreiter**—Hang on. He can easily seek the replacement of those goods by importing them again. He could have decided—

**CHAIR**—Excuse me? That is like saying—

**Mr Vorreiter**—Excuse me, Madam Chair. If he was not prepared to take the goods back on security, he could simply have reordered the goods from overseas at \$13,000, on his valuation.

**CHAIR**—So it did not matter at all that he had lost his profit component from the one import and that, every time he then tried to bring in a shipment, you seized it? He tried to bring it in through Brisbane and you seized it and made it absolutely clear that Customs was going to seize it every time.

**Mr Vorreiter**—Using a false name.

**CHAIR**—You were not there.

**Mr Vorreiter**—Using a false name.

**CHAIR**—I accept that you were not there and this is a reconstruction on your part.

**Mr Rodda**—He changed his name by deed poll. It was not a false name at all. He changed his name because he had always been persecuted by Customs.

**Mr Vorreiter**—Customs’ view at the time—quite properly founded—was that he was disguising his identity in relation to the other importations.



**CHAIR**—I accept that Customs made an interpretation at the time, but I do not accept that the interpretation was correct.

**Mr Woodward**—On that note, should I continue? I want to make only a couple more points.

**CHAIR**—Yes.

**Mr Woodward**—I had spoken about money being transferred overseas. The point I was going to continue to make was that clearly Mr Tomson had control over significant assets at the time. It has also been stated that he had a number of overseas investments, including a timber mill in Laos, as well as other joint ventures. Mr Tomson has not provided an explanation on how he was in a position to transfer such a large sum, whether the transfer was for investment purposes and whether any of it was repatriated to Australia and, if so, how much; nor has he given evidence of whether or not his overseas investments were successful. In any event, contrary to earlier suggestions, it has now become clear that Mr Tomson was not made bankrupt until 15 November 1999, well after Customs seized his goods. The committee should note that in the intervening period Mr Tomson made other significant transfers of money overseas.

The particular point that I now want to draw your attention to is in the draft transcript, on page 27, where there is a discussion about how Mr Tomson became bankrupt. Mr Secker asked:

So did the bank actually bankrupt him—the mortgagee?

Mr Rodda's answer was yes. We have had a look at the bankruptcy information because we have an interest in the nature of the bankruptcy and the particular bank. The documents on the bankruptcy show that the petitioning creditor was Chanthakhath Bounpraseuth. Mr Bounpraseuth was a creditor for \$198,000 of total liabilities of \$291,200. The petitioning creditor, Mr Bounpraseuth, lists his address as Unit 4, 14 Bridge Street, Cabramatta. A person of the same name and address has a long list of convictions, including malicious wounding. Most notably, he was convicted in 1996 of supplying a prohibited drug and was sentenced to two years imprisonment. We believe the drug concerned was heroin.

The next point is about costs. Mr Rodda has said in evidence before the committee that Mr Tomson was not charged for any legal costs in relation to the appearance and advice work that had been done for Mr Tomson throughout the period in question. Mr Tomson did in fact recover costs for the local court proceedings.

**CHAIR**—They were settled costs.

**Mr Woodward**—Yes, agreed costs. Of course, an important principle in relation to the recovery of legal costs is that they are compensatory and a party cannot recover costs unless they have, in fact, incurred legal fees. The payments in 1998 were not ex gratia, as claimed by Mr Rodda to this committee, but were arrived at by agreement between the parties. Earlier today Mr Rodda—

**CHAIR**—What was the nature of the agreement?

**Mr Woodward**—It was an agreement under the court. We discussed that last time and I think—

**CHAIR**—What was the total amount of costs claimed?

**Mr Woodward**—You will recall that I made a point about \$172,000 of Mr Rodda's expenses—

**CHAIR**—And the amount paid?

**Mr Woodward**—which in large part, if not totally, were not agreed to.

**CHAIR**—You paid \$80,000, from memory. Is that right?

**Mr Daley**—The total was about \$240,000, of which about \$170,000 related to the consultancy firm of Rodda Bailey Vagg. In fact, in the end about \$90,000 was agreed. We can get those precise figures fairly easily; I have them in the papers here.

**Mr Woodward**—The total figure was about \$99,000 and certain offsets were associated with that. I may even have that in the submission.

**CHAIR**—Do you have a comment to make about that, Mr Rodda?

**Mr Rodda**—I understood that it was an ex gratia payment, but I concede that I may be wrong. I had no involvement in the negotiation of the fee settlement anyway.

**CHAIR**—Did you in fact receive \$140,000 of consultancy fees?

**Mr Rodda**—No, nothing. I might add that, although accounts were rendered, Mr Tomson did not pay any for the simple reason that he had no money. We were all working for nothing, and we knew that.

**Mr Daley**—There was no component in the agreed costs relating to Mr Rodda on the basis that he was not a legal practitioner; therefore there is no entitlement to get legal costs back. It was on that basis that his costs were excluded. The figure arrived at was around \$90,000, relating to both Supreme Court and local court proceedings, representing Mr Barwick's fees plus counsel fees. There was no component for Mr Rodda.

**CHAIR**—Next time Mr Rodda would be well advised to apply for his practising certificate, wouldn't he, and then he would get his fees.

**Mr Daley**—That is a matter for Mr Rodda. All sorts of things go with being a practising solicitor or barrister.

**CHAIR**—That is one reason why I continue to keep my current practising certificate.

**Mr Woodward**—That was a point I was going to make—that Mr Rodda this morning has said that he does not have a practising certificate and therefore there is no need for me to mention information we have obtained from the Law Society or from the Bar Association which indicates that no person—

**CHAIR**—But he made that quite clear at the last hearing; he said that he was qualified but had not applied.

**Mr Woodward**—Therefore I am letting it go. My last point is: what is Mr Rodda advancing; what is it all about? In fact, I think it has been recognised today but I will put my view. The view I have is that Mr Rodda's principal aim is to achieve a large monetary payout from the government. This is most clearly indicated in an attachment to a letter sent to me by Mr Cadman, in which Barwick Boitano passed the following comment to the Ombudsman—

**CHAIR**—You are quite right, Mr Woodward, but this is already admitted to. That is part of the contention.

**Mr Woodward**—Mr Boitano stated:

Even were the outcome of such an internal departmental inquiry to be favourable to the complainant, it could not be hoped that, even were there then to be negotiations, the Director-General—

that is, me—

would be in a position, of his own discretion, to concede what may well prove to be a multi-million dollar compensatory payment.

That is what I think that part of the inquiry is all about. That ends my opening submission.

**Mr Daley**—The costs figures are on page 25 of that supplementary submission. That says that there were net costs of \$79,355.19 for the local court—that is after some adjustment to set off Federal Court costs awarded to Customs—and \$20,075 for Supreme Court costs.

**CHAIR**—Which one is that in?

**Mr Daley**—It is the long submission from Customs that was lodged on 21 July.

**CHAIR**—I was right; I said about \$80,000.

**Mrs Grant**—Plus the \$20,000.

**Mr Daley**—It was about \$90,000 and then there was a set-off for the Federal Court costs.

**CHAIR**—So there was simply a bit of argy-bargy and a bit of an agreement was struck.

**Mr Woodward**—There was \$20,000 in the end that was thrown in.

**CHAIR**—Having been waiting since 1995 and it now being 1999, I reckon I might settle too.

**Mr Daley**—The argy-bargy, if I can adopt the vernacular, was in relation to whether Mr Rodda's fees should be paid, and Customs took the view that they should not be. In the end that was the basis upon which the matter was settled.

**CHAIR**—As I said, next time he should apply for his practising certificate and he would get his dough. It's a nice little legal loop we have here, isn't it?

**Mr Daley**—That is a matter for Mr Rodda.

**CHAIR**—I want to go back to page 15 of your submission 'Customs ignored evidence that Mr Tomson was innocent'. You state:

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

**Mr Woodward**—You have lost us. Did you say page 15?

**CHAIR**—Yes, page 15. I am really concerned about the length of time that was taken in this whole proceeding. Refresh my memory: if this had been somebody who was not under Customs' attention and it was just anyone who had been brought in and there had been a challenge, is there not a provision that you can make a payment under penalty—take the goods and trade in those goods? Is there such a provision?

**Mr Vorreiter**—Yes, there is a system where you can pay duty under protest. You can take advantage of administrative law proceedings to have determined what the proper amount of duty ought to be. That is a process set out in the act. It was present then and it is present now.

**CHAIR**—Say a Mr Robinson had brought in these goods and he was not under the scrutiny of Customs; he had not been brought to their attention in any way. In that hypothetical, would Mr Robinson be offered the option of paying under protest—getting the goods and continuing to trade?

**Mr Woodward**—I will start to deal with that. If Mr Robinson had had the antecedents that we have outlined—

**CHAIR**—I did not say that. I said if Mr Robinson had not come to the attention of Customs—

**Mr Woodward**—We cannot answer that question in the way in which you put it. If there was no reasonable basis for us to take any action, the answer would be no. In this case there were reasonable grounds, in our view, to suspect there was fraud.

**CHAIR**—Do not confuse the issue. I asked you: if Mr Robinson brought in goods like this—and he was not under special attention of Customs—would he have been offered that option?

**Mr Woodward**—If Mr Robinson was a first time importer—we had no information on him and there was a reasonable assumption that the person had made an innocent mistake—the answer would be yes. But that is not the case—it does not apply in this case.

**CHAIR**—So are you telling me that option applies only to first time importers?

**Mr Woodward**—Of course it doesn't.

**CHAIR**—But you just said 'if he was a first time importer'.

**Mr Woodward**—You asked me about Mr Robinson. You would not allow me to go on and define Mr Robinson.

**CHAIR**—I am defining Mr Robinson. You are answering the question. I am defining him as being someone who is not under the specific attention of Customs.

**Mr Woodward**—And if there is no reason for us to have any grounds to suspect that he has been, is, or will be involved in any attempt to defraud Customs, bringing in goods that are illegal or in any other way on our warning lists—of which there are many because we have warning lists for many agencies—the answer would be no, but with all those provisos.

**CHAIR**—All I asked you was whether he was not under your specific attention. All the things you just described were under your specific attention.

**Mr Woodward**—It is one of those things that I cannot give you a yes/no answer.

**CHAIR**—How many times in the past 12 months has somebody brought something in and there has been a dispute over the value and they have been offered that option? How many times has that occurred in the last 12 months?

**Mr Woodward**—There would be numerous occasions where people—

**CHAIR**—Could I get those figures?

**Mr Woodward**—I do not know whether we would have that sort of information.

**Mrs Grant**—That is not the sort of information that we collect as a matter of course. For people to pay under protest, their entry—for whatever reason—has come to our attention in the first instance. For a lot of those reasons we would run a computer program across entries just looking for gross errors—the same sort of thing the Bureau of Statistics does across numbers. If something looks out of the ordinary it will be red lined and an officer will look at it to see if they have just put the decimal point in the wrong place—that sort of thing. Then you might do a post-warrant amendment and adjust the amount of duty payable. If it comes to our attention that way—the importer might say, 'No, I say the amount of duty I am tendering is correct'; Customs might say, 'We dispute that'—then the option of payment under protest exists. It is not the sort of statistic that we collect.

**CHAIR**—Mrs Grant, you must have a financial list somewhere that identifies the amount of money that was paid under protest. It must be itemised somewhere, because some people may pay under protest, go on and challenge it and then get the money back.

**Mrs Grant**—We certainly have details on payments under protest, because people tend to pay under protest so that they can then take the next step and go to the AAT to have the matter dealt with. I misunderstood your question; I took it to mean how many times we would make the offer to people to pay under protest. We would not normally make an offer to pay under protest.

**CHAIR**—Just tell me how many times in the last 12 months payments have been made under protest, and then tell me the success rate of people who challenge it.

**Mrs Grant**—We will take that on notice and get you those figures.

**CHAIR**—Also tell me whether or not those people who have paid under protest then come under the specific attention of Customs for ongoing matters.

**Mrs Grant**—It is not an automatic step that people who pay under protest come under the attention of Customs after that. People will pay under protest for varied reasons. It is a completely different set of indicators which would bring somebody to the point of our undertaking an investigation.

**CHAIR**—I would like to get those figures so that we know. I would also like to get the number of prosecutions that have been brought for disputed valuations—like in this case—and the length of time between seizure of goods and charges being made or any information being sworn. Mr Woodward, I would imagine that, under your watch, five years is not a normal time.

**Mr Woodward**—We now have far more rigorous processes in relation to most of the matters covered in this submission, including a very close look at the progress of cases. Certainly with regard to taking decisions to proceed or not to proceed, we have far better case management now than applied in that period. That is obvious.

**CHAIR**—I have just been overseas looking at crime issues and the relationships that we have with overseas agencies, and the work between Australian Customs and agencies in other parts of the world is highly regarded. There is good work going on. The seizure rate has gone up to eight tonnes since 1998, and so on. That is an impressive record, and one can measure the improvement in Customs under the current administration, compared to the way it was previously. What worries me is that there are so many elements in this case that we are talking about now—which, as I said, began way back there in the eighties—which are so similar to the Midford Paramount case; when I read it, it sent up all the signals. Advice was sought on 12 and 13 September 1987, 22 June 1988, 24 February 1988 and, finally, in December 1990. All the time there was an attempt to build and justify—whatever words you like to use—the case, and to me that is not a good track record. I cannot imagine that Customs behaves like that now.

**Mr Woodward**—I would think that our management processes would make it more difficult for that sort of thing to occur. As I said to you before, it is very difficult to stretch back and work out from the papers what happened and why. The points that are being brought out include the complexity of the case, the continual going backwards and forwards between the DPP, the AGS

and us, and a couple of external reasons for delay as well. Whether all of that adds up to what Mr Rodda is really saying is malicious prosecution is another question. In hindsight, I do not think that it does amount to malicious prosecution. I do not believe that there was a deliberate attempt to do so, on the part of Customs officers at that time. We will find out in due course whether my assessment is right.

The unease I have is that, from the way in which the proceedings occurred today, it seems to me there is almost an attempt to retry a case which took place a number of years ago. All of us—except for Mr Rodda and you—are new. Is it the intention of the committee to retry the case, or is the intention of the committee to look at the averments? I draw your attention again to the point that we made at the end of the original statement, which is that Senator Ellison has already expressed some retraction to the Law Reform Commission's submission—

**CHAIR**—Indeed he has.

**Mr Woodward**—and displayed an intention to have a critical look at averments. I am trying to draw a distinction between averments and the Tomson case.

**CHAIR**—I do not think that you can. That is the point that I was making very strongly this morning about averments. This is why I have this concern in this particular case. The guts of the case were that Mr Tomson put in false valuations. Those things are averred to. No evidence was drawn, no evidence was called, to prove them at all. Taking Customs' most rosy interpretation of that—that they did not have to, because somehow the defence acquiesced in it or whatever—the bottom line was that no evidence was called to prove that they were false in the particular—none.

**Mr Woodward**—Can I comment on that; I might leap in before our lawyers do. Again, as someone who is coming to it afresh and who is not a lawyer—which is a difficulty that I have had—it has been put to me, and I have accepted, that the averments basically had little work to do. I know Mr Rodda has an entirely different view, and I think that you have a different view. The arguments were presented, the arguments were argued and, if my recollection is right—and I need to check it—there were about 13 days of hearings in two years. In the material that we have given to you, you will see that the transcripts of the hearings are in two large volumes. There were extensive arguments against it.

**CHAIR**—The bottom line is that there were 13 days of hearings and Customs lost.

**Mr Woodward**—That is right. But that does not say that it was malicious.

**CHAIR**—The 13 days hearings commenced five years after the event and continued up until 1995, and then there was the wrangle over costs until 1999. We are talking about 12 years.

**Mr Woodward**—No-one has denied that Customs lost the case. The point that is being made by Mr Rodda is that the prosecution was malicious. We lost the case; that is a fact. Some of the critical evidence was that the magistrate preferred the evidence of one adviser over another, although there were obviously other points that he took into account. But I cannot accept, on the basis of the material that I have seen so far, that there was anything malicious on the part of

Customs officers. If I did think that, I would be here saying, 'I'm sorry, Chair; we have stuffed up, and here is what we're going to do.' I am not doing that.

**CHAIR**—I do not believe, with regard to you, that you are in a position to say that. At the end of the day, if anything were to be done about this case it would not be your function; it would be a function of government. It may turn out that it is viewed as malicious, or it may turn out that there was—and I think this is more likely to be the case—a failure to properly investigate. That is indeed the position in Midford; it was a failure to properly investigate and involved proceeding on a false premise. The contention here is that Mr Tomson deliberately made a false statement of value, and those things are averred to. In the case, no evidence was called to prove that falsity. Mr Daley has said that actually it was all the defence's fault because they acquiesced in it. But when they went themselves to bring on their own defence they were believed and Customs were not believed.

**Mr Daley**—I think my evidence earlier may have been misunderstood. I was talking only about the overseas documents. What I have also said is that evidence was led in relation to the averments as to price. If you look at the supplementary statement starting on page 5 under the heading 'Reliance on averments', you will see that I have detailed in some—

**CHAIR**—I do not accept Mr Prelea was evidence as to falsity of the documents.

**Mr Daley**—Chair, if I can just take you then to the quote from the magistrate's ruling on this very point, which is on page 8 of the supplementary submission. I will read it in full because it is interesting. It may be page 7 or 9 of your documents; I am told that my pages might be different to yours. There is a quote in the middle of the page which is extracted from the magistrate's ruling on the prima facie case submission that was made by Keomalavong. I just note there that Mr Tomson did not dispute that there was a prima facie case; Mr Tomson conceded that there was a prima facie case. Mr Keomalavong was the one who disputed it, not Mr Tomson. There were no submissions made on behalf of Mr Tomson in relation to that. The quote itself, which is the ruling on the point, starts—

**CHAIR**—But, Mr Daley, this is only pertinent to whether or not the defence had to put on a defence.

**Mr Daley**—It is pertinent to the point that you have just made, Chair, where you just said that no evidence was called that supported the averments on price. A moment ago, unless I misunderstood totally, you said that there was no evidence called to support the averments.

**CHAIR**—I did not. I said that there was no evidence called on the falsity of the documents.

**Mr Daley**—Well, that is what price is all about—the allegation—and the averment was that the goods were not valued properly in the entry.

**CHAIR**—No. The discrepancy was, the allegation of Customs was, that these were in fact two purchases and you should add the two together.

**Mr Daley**—No. The case was based upon whether or not the goods were undervalued when they were entered. The allegation of Customs was that the prices disclosed in the invoices were



not genuine. Mr Prelea's evidence went to that very point and the magistrate, in the passage I will read out, recognises that. The magistrate said:

On the documentary evidence which I have summarised and the evidence of ... Mr Prelea, there is evidence to indicate that the defendant paid a price in excess of that of price for the clothing—

referred to in the entry. I have paraphrased that because it is difficult.

**CHAIR**—That is right. Mr Prelea said.

**Mr Daley**—But that is the point. There was evidence from Mr Prelea about price. That was called in support of the averment.

**CHAIR**—But not as to the falsity of the documents.

**Mr Daley**—No. That is precisely what it went to.

**CHAIR**—No. The documents were, one, the requirement under Thai law to provide a price in a foreign currency. Am I right or wrong?

**Mr Vorreiter**— No.

**CHAIR**—And the necessity to put the price for the invoice for importation to Australia.

**Mr Vorreiter**—The allegation in each case was that the commercial invoice produced to Customs contained a false price. Mr Prelea gave evidence which tended to show that the price declared by Mr Tomson was false. It is as simple as that.

**Mr Rodda**—No, he did not, Madam Chair.

**Mr Daley**—Mr Rodda, if you let us finish our evidence. It is our turn, not yours, with respect.

**Mr Rodda**—Well, I am sitting at the table with you.

**Mr CADMAN**—He is sitting pretty quietly, I have noticed.

**CHAIR**—I will ask Mr Rodda that question in a moment. Have you got something else to say, Mr Daley?

**Mr Daley**—I am not sure that the point has got across. The fact is that the prosecution disputed the genuineness of the price. The proposition being put is that the averment on price was not supported by evidence—

**CHAIR**—I think we had better have a look at Mr Prelea's evidence.

**Mr Daley**—Chair, I have just read out the passage where the magistrate ruled on that.

**CHAIR**—Yes, but when a defence was put on, it was shown that the evidence was not there to prove that the price was wrong. You lost. You did not call your own officers—

**Mr Daley**—The magistrate simply said that he was not satisfied that he should find on the balance of probabilities. It did not say that he said that the offences did not occur—simply that he could not prove the—

**CHAIR**—I thought we established earlier that we were using ‘beyond reasonable doubt’ as the standard of proof.

**Mr Daley**—I beg your pardon. I slipped into the civil standard. It was a criminal standard beyond reasonable doubt.

**CHAIR**—We established that earlier this morning. I made a particular point about it because it is very important.

**Mr Daley**—I apologise. I made a slip. The prosecution had to reach that higher standard—

**CHAIR**—It is a hell of a slip.

**Mr Daley**—The prosecution had to reach that higher standard of beyond reasonable doubt, and in this case they did not but they did establish a prima facie case. I am simply answering the point which is being put that there was no evidence called to support the averment. I have got to make the point because it is fundamental to this entire hearing.

**CHAIR**—Yes, it is.

**Mr Daley**—The point is that evidence was called in relation to the falsity of the entries. That related to the falsity of the price. That is what the prosecution alleged. Mr Prelea was called in support of that and the magistrate accepted for the purposes of the prima facie case that that evidence had proved that point. That is the only point I am making.

**CHAIR**—The magistrate held there was a prima facie case made out. In doing so he paid attention to all of the evidence that was before him. That means the very few witnesses that you called and the averments to which he must pay heed.

**Mr Daley**—And all of the documents and the evidence of Mr Prelea.

**CHAIR**—Mr Prelea, who gave evidence once the defence put on a case, was not believed.

**Mr Daley**—I think we are at cross purposes. I am simply answering the proposition that there was no evidence called. There was clearly evidence called and the magistrate accepted it for the purposes of finding a prima facie case. That is the point that we are arguing about, as I understand it.

**CHAIR**—The point I am trying to make is that there was no evidence called from your Customs officers at all about the falsity of those documents.

**Mr Daley**—What would that evidence be?

**Mr Vorreiter**—A Customs officer would almost never be able to give evidence as to the falsity of the price. Falsity of the price is sourced from other sources.

**CHAIR**—Excuse me. We the taxpayer paid for them to go overseas and investigate. Was that a junket or a tour or something?

**Mr Vorreiter**—Had the overseas suppliers been willing to come—Madam Chair, I will wait until you concentrate on my answer. Had the overseas suppliers been persuaded to come to Australia to give evidence, then that would have been admissible evidence; that would not have been hearsay evidence. But a Customs officer cannot give evidence of the conversation that he had with overseas suppliers. That is why the evidence which was originally set out in Mr Gausam’s statement was considered to be inadmissible.

**CHAIR**—That is precisely the reason you say you need averments, because you cannot prove the case.

**Mr Vorreiter**—That is certainly one of the reasons.

**Mr Daley**—But in this case the averments were not relied on. The evidence of Mr Prelea was relied on and the magistrate’s ruling makes that very clear.

**CHAIR**—No, it does not. It is part of the evidence.

**Mr Daley**—Madam Chair, it is very clear when you see what the magistrate said about price; he relied on the evidence of Mr Prelea.

**Mr Vorreiter**—There was no misunderstanding in this case.

**Mr Daley**—It is very clear.

**CHAIR**—Where is the page of the transcript from which you have taken this?

**Mr Daley**—It is page 5 of the transcript of 20 April 1994, I believe.

**CHAIR**—I would refer you to page 3, when he refers to ‘the use of the word “false” in the averments contained’ in the information laid pursuant to the provisions of section 234.

**Mr Daley**—The magistrate struck that word out in subsequent—

**CHAIR**—As we know—

**Mr Daley**—That word was struck out in the averments relating to smuggle and evade.

**CHAIR**—As we know, you may not aver as to matters of law only as to matters of fact and it is matters of fact that cause a magistrate to determine whether there is a prima facie case. The

magistrate takes great care in going through case law *Davidson v. Watson* to determine that the use of the word ‘false’ is a matter of fact and averment as to a matter of fact and therefore it stands.

**Mr Daley**—In relation to the false entry charge, it is correct—not in relation to the smuggle and evade charges. That was the effect of the ruling.

**CHAIR**—That is all right—false. So it was averred to.

**Mr Daley**—No-one is disputing that it is averred to.

**CHAIR**—You seem to want to say that the magistrate paid no attention to your averments as to being ‘false in a particular’—

**Mr Daley**—No, Chair, what I said was that—

**CHAIR**—and that he relied entirely on Mr Prelea’s evidence and, therefore, the averments are irrelevant. As I understand it, that is what you are saying to me.

**Mr Daley**—No, Madam Chair. It is accepted—indeed, it is a very clear point, to answer one of Mr Rodda’s submissions—that the averments did put in issue the genuineness of the price. The point I was making was that, in answer to the proposition that no evidence was called beyond the averments in relation to price, there was evidence—including the evidence of Mr Prelea—

**CHAIR**—I do not accept—

**Mr Daley**—and that was relied on by the magistrate. I have just drawn the committee’s attention to the relevant passage, which makes that quite clear.

**CHAIR**—But you have taken it out of the context. The magistrate was paying attention to more than what Mr Prelea had to say.

**Mr Daley**—The context is very short—it is two pages—and, true it is, the magistrate refers to the averment on price; we do not dispute that. The point we make, though, is that the primary ruling—at the bottom of page 5—refers to the evidence of Mr Prelea to support the conclusion that the price was false.

**CHAIR**—But it is only part of what he relied upon in saying that there was a prima facie case. When the case had a defence presented, Mr Prelea was not believed.

**Mr Daley**—I would be happy if it was agreed to that there was evidence called by Mr Prelea relating to price. If that is accepted then that is the point I am seeking to make. That is the only point I am seeking to make: Mr Prelea’s evidence went to price.

**CHAIR**—The point I making is that the averments were relied upon.

**Mr Daley**—They were part of the whole case, of course.

**CHAIR**—Correct.

**Mr Daley**—But there was other evidence called in relation to each averment. There was evidence called in relation to each relevant averment that went to the core elements of the offences. That is the point we wish to make.

**Mr Vorreiter**—Another way of putting it is that the averments were supplemented by evidence in the ordinary way.

**CHAIR**—But they were not in the ordinary way, because you said that you were going to call witnesses that you did not call.

**Mr Vorreiter**—There was documentary evidence and the evidence of Mr Prelea, who was an expert on value and therefore price.

**CHAIR**—He was a complainant, too.

**Mr Vorreiter**—This evidence was accepted by the magistrate.

**CHAIR**—Prima facie, until it was tested. When it was tested, it was rejected.

**Mr Vorreiter**—No, not when it was tested in the Crown case. It was completely accepted in the Crown case and, indeed, the magistrate did not say that he did not believe Mr Prelea at the end of the day; he merely said—

**CHAIR**—He believed the—

**Mr Vorreiter**—Madam Chair, this is important. He merely said that he was not satisfied beyond reasonable doubt that the prosecution had proven its case—

**CHAIR**—Correct.

**Mr Vorreiter**—because, at the end of the case, the magistrate had also had the benefit of listening to the competing expert called by the defence, and that was sufficient to raise a doubt. It was just a reasonable doubt, and that is why Customs lost the case. It is as simple as that; it happens every—

**CHAIR**—He did not say that it was just a reasonable doubt; he said that the prosecution did not prove its case in accordance with the standard required.

**Mr Vorreiter**—Which is beyond reasonable doubt.

**CHAIR**—Correct. But that is not to say that it was just an itty-bitty little doubt he had.

**Mr Vorreiter**—It was a reasonable doubt.

**Mr Daley**—It is also not to say that the defence proved beyond reasonable doubt that the prices were genuine.

**CHAIR**—It is not their responsibility to.

**Mr Daley**—Quite so. The magistrate was left with a reasonable doubt, which is not to say that he found that the offences did not occur; he simply could not convict on them. There is a world of difference, Madam Chair.

**CHAIR**—Is that where we get the thinking when court decisions come down and departments say, ‘We just don’t believe what the court said’? The tax office is very good at that.

**Mr Daley**—No. Customs, obviously, accepts in this case that they failed to come up to the criminal standard to prove their case. As I said before, the integrity of the process is demonstrated by the fact that sometimes a prosecution will not succeed.

**CHAIR**—Thirteen days over a 12-year period is not my idea of justice.

**Mr Vorreiter**—Maybe so, but when the magistrate was asked to rule on an application for costs based upon the allegation that the investigation had miscarried and that the prosecution had not been properly commenced, he rejected the application.

**CHAIR**—That was overturned.

**Mr Vorreiter**—But not on that basis.

**CHAIR**—Where is the judgment? We have not seen it.

**Mr Daley**—Madam Chair, I offered earlier in the day to explain that point, which I am happy to do now. I will try to do it as succinctly as I can. The defence made an application—at the end of the hearing, after the trial magistrate had acquitted them—that, with reference to section 81 of the Justices Act, there should be an order for costs. The grounds they put forward were that there had been something unreasonable or improper in the way in which the prosecution had investigated and prosecuted the matter. That is what the magistrate rejected. The matter then went on appeal, and the Court of Appeal said that the magistrate referred to the wrong section. It did not deal with his view about the propriety of the prosecution case. The court simply said that section 263 of the Customs Act was the relevant cost provision, not section 81 of the Justices Act. It is as simple as that.

**Mr Vorreiter**—So, at the end of the day, the court did not have to be satisfied that the prosecution was incorrectly commenced in order for costs to be awarded, because section 263 of the Customs Act says that costs follow the event just as they do in an ordinary civil case.

**CHAIR**—Correct.

**Mr Vorreiter**—That is why Justice Abadee of the Supreme Court held that the defendants should be entitled to costs. But the decision that the magistrate made—that there was no

untoward investigation or prosecution; that it had not been miscarried—was not overturned. That is the important point to make.

**CHAIR**—The magistrate made the decision that he would apply a particular section of the act to determine whether costs were to be paid, and he was wrong.

**Mr Vorreiter**—He was wrong only in applying the section.

**CHAIR**—Correct.

**Mr Vorreiter**—It is fair to say that he—

**CHAIR**—The long and short of his error in so doing is four years.

**Mr Vorreiter**—Madam Chair, it is fair to say that the magistrate considered the submission from the defence that the prosecution had been improperly commenced, and that was rejected. That issue was never dealt with on appeal. That finding was not overturned. That is the important point to take away from this hearing.

**CHAIR**—That is like saying that the magistrate decided that he would determine whether costs were paid in accordance with any other criteria he might like—whether he liked the colour of your eyes or that your hair is brown.

**Mr Vorreiter**—He was invited to consider the criteria in section 81 of the then Justices Act. He rejected the application. He rejected the application because this prosecution commenced and was continued as an ordinary prosecution in which Customs had to prove its case beyond reasonable doubt. At the end of the day, the magistrate preferred the evidence of the defendant's expert—

**CHAIR**—Correct.

**Mr Vorreiter**—as opposed to the Customs' expert, but so what? That happens every day in the criminal courts.

**CHAIR**—We are not in the criminal courts; we are in the civil court.

**Mr Vorreiter**—We are, in fact, in the criminal court. We are in the local court because the standard of proof is beyond reasonable doubt, which we have just agreed on.

**CHAIR**—But it is not a criminal proceeding.

**Mr Vorreiter**—For all intents and purposes—I know it might seem a bit odd—a Customs' prosecution in the local court is a criminal proceeding for all relevant purposes.

**CHAIR**—Then you may not aver.

**Mr Vorreiter**—Except for that.

**Mr Daley**—That does not follow, Madam Chair.

**Mr Vorreiter**—It does not follow at all.

**Mr Daley**—You can aver in some criminal matters, under some different statutes. There is an averment provision in the Crimes Act. It does not matter in the Customs Act as to whether you are in the Supreme Court or the local court—the averment provisions still apply. One is treated as effectively criminal and the other is effectively civil. The standard of proof does not affect whether or not the averment provisions are available.

**CHAIR**—Are you able to aver under the Customs Act in the local court for a criminal prosecution?

**Mr Daley**—For a Customs' prosecution?

**CHAIR**—It is a civil prosecution, isn't it? If you want a criminal prosecution, you have to go to the Crimes Act, do you not?

**Mr Daley**—If you want a criminal prosecution, yes. If you want to run a Customs Act prosecution and rely on the averment provisions, then in the local court they use the criminal standard and in the superior court they use a civil standard. You can use averments in either proceeding. In other words, the standard of proof does not affect whether or not you can use averments.

**CHAIR**—That depends on the court.

**Mr Daley**—It depends on whether section 255 of the Customs Act applies to the proceedings. It applies in both local court and Supreme Court Customs' prosecutions. Section 255 of the Customs Act does not apply to a Crimes Act prosecution—I would agree with that.

**Mr Vorreiter**—It depends on the court, as you said, Madam Chair. There are sections in the Customs Act that are longstanding—since 1901—which say that, if a Customs' prosecution is commenced in the local court or magistrate's court, it is, for all intents and purposes, treated as an ordinary criminal prosecution in that court. However, if it is commenced in the district or the Supreme Court, it is treated, for all intents and purposes, as a civil prosecution or a civil case. That is the dichotomy. In this case, Customs chose to subject itself to the more onerous standard by commencing in the local court. Customs could have commenced this case in the Supreme Court, where only the civil standard of proof would have applied and the outcome might have been quite different.

**CHAIR**—It might not have been, too.

**Mr Vorreiter**—The civil standard applied in the Supreme Court. Therefore, it would have been easier for Customs to prove its case in the Supreme Court.

**CHAIR**—Do you feel that it is reasonable that the different courts should have different standards of proof? Is that a reasonable thing to have?



**Mr Vorreiter**—It is longstanding.

**CHAIR**—That does not matter. Is it reasonable?

**Mr Daley**—That is a matter before the High Court at the moment. I do not know that the outcome much matters.

**Mr Vorreiter**—And it is a matter for parliament, ultimately.

**CHAIR**—It is a matter for parliament—you have got it right.

**Mr Woodward**—That is picked up in the ALRC report. It is 1000 pages. Your point that it is very hard to understand is a valid one. It has applied for a long time but those in the game understand it. It has been picked up and the government will be considering that issue in due course. I was just going to make a quick point to reinforce the distinction that I drew earlier about the principal aim of the inquiry, which is to look at Customs' use of averments. The terms of reference clearly indicate that you would be looking at cases, and you have looked at one. In our own submission we have talked about other cases. I can understand why you would look at the use of averments in this case to relate it back to the policy—whether or not there ought to be a change in policy practice or the law.

Following the suggestion from Mr Murphy, we have attempted to focus, in these hearings, on the Tomson case. In our written and oral submissions we have attempted to cover the four allegations that have been made about whether or not the prosecution was—if I can use my term—malicious. The elements were, firstly, 'Customs officers who conducted the investigation failed to investigate the case in an impartial and objective manner'; secondly, 'Customs ignored evidence that Mr Tomson was innocent'; thirdly, 'Customs officers swore false information to obtain the section 214 warrant'; and, fourthly, 'Customs deliberately destroyed Mr Tomson's business.'

What we have attempted to do in our written submissions and the oral material that we have presented to you today is put to you that it is our view, based on what we have seen and heard—and we have listened very carefully to what Mr Rodda and others have said today—that we do not believe that that is the case. The principal issue of the committee is whether or not there ought to be a change in the law so far as Customs Act prosecutions and the use of averments are concerned. We have certainly had a useful discussion on that. We do not believe there is much more that we can take out of what has occurred in the Tomson case to deal with what we saw as the principal focus of the committee: whether or not those provisions ought to be changed. As I mentioned to you before, the minister has already said that he has a good deal of sympathy for the view put forward in the ALRC report.

**CHAIR**—Yes, I understand that.

**Mr Woodward**—I am really putting to you whether the committee would want to consider whether there is a lot of advantage in continuing the very heavy focus that there has been on the Tomson case—I entirely accept that it is for you to decide. There is more information that we said would provide and I reinforce for you that, after a quick check of the material that you have asked for this morning, our guess is that there will probably be 20 to 30—it could go to 40—

volumes of the size that you have before you. I have said that we will provide that information. You will presumably copy and make it available. It will take us a fair while to do that, but we will comply with your request.

**CHAIR**—Thanks very much. There is a hell of a lot reading, in what we have received from you and Mr Rodda, for us to go through as a committee between now and next time we meet. The size of the volumes that are about to come before us and the material we have to look at will probably determine when we next sit, because I would be very keen to go through the material.

**Mr CADMAN**—How much did the Bellew inquiry cost?

**Mr Woodward**—The Bellew inquiry has restarted; it is not over. I do not know the cost.

**Mr CADMAN**—Can you let me know how much the initial part cost?

**Mr Woodward**—We will get that for you.

**Mr CADMAN**—In truth, if the person involved—eminent though they may be—is briefed and paid by Customs, how can it be regarded as more than just a seeking of an opinion rather than an inquiry?

**Mr Daley**—It is no more than seeking an opinion. You need to understand the context in which it was sought. Mr Rodda had advanced a number of allegations and Customs wished to take its own counsel on whether or not there was any substance to those.

**Mr CADMAN**—That is a very interesting process.

**Mr Daley**—It was never conducted as some sort of joint brief.

**Mr CADMAN**—Mr Rodda could hardly be criticised if he does not front if that is the way in which it was instigated.

**Mr Daley**—All that he was asked for was to provide particulars of the allegations because some of them were bare assertions with nothing supporting them.

**Mr CADMAN**—Dear, oh dear. I am no lawyer but, mate, I would want to do that in court. I would not give that to anybody.

**Mr Daley**—The chance to go to court has been there for many years and it has never been taken up. We do not know why. We assume it is because they do not think they have a case. Why else haven't they gone to court?

**CHAIR**—You took 12 years. Can't he take 12 years?

**Mr Daley**—The limitation act will not let him, I do not think.

**Mr Vorreiter**—Even now Mr Rodda is still asserting that this was a malicious investigation and prosecution. That is what he is asserting now. But he has not provided a single particular, even now, as to why that is the case.

**Mr CADMAN**—Why for the life of me would I come to your appointed adviser, who is providing you with a legal opinion, and make a statement about why I held a point of view that could in fact have significant ramifications both for Mr Rodda and for Mr Tomson? I do not know why anybody with commonsense would do that. Why do you expect them to?

**Mr Daley**—Because Mr Rodda was the one who advanced the allegation. Customs was merely seeking its own opinion as to whether or not there was any substance to it.

**Mr CADMAN**—If you disagree with it, why didn't you put him in court?

**Mr Daley**—Customs could not understand the allegations so it sought particulars. It is quite standard practice.

**CHAIR**—I think what you have had to say is really quite important because the Bellew inquiry was put to us as an inquiry. I understood it to have been an inquiry. You have been much more honest now in saying that you are merely seeking an opinion.

**Mr Daley**—Certainly I am not aware that there was any attempt to mislead before. I really do not believe that was the case.

**CHAIR**—That was my understanding: it was an inquiry. I will go through some stuff here and I will find that word.

**Mr Daley**—Mr Rodda may have left that impression because he referred to—

**CHAIR**—Excuse me; it was not Mr Rodda who gave me that impression.

**Mr Daley**—He may have left that impression because he used terms like 'the terms of reference'.

**CHAIR**—It was not Mr Rodda who gave me that impression.

**Mr Daley**—I am not aware of how the impression was otherwise conveyed. If that is the case, then obviously it is a misunderstanding.

**CHAIR**—I am very glad that point has been cleared up.

**Mr Woodward**—Can I add one point in answer to the question asked by Mr Cadman, which is a fair point. In the attachment to the letter which you sent to me from Barwick Boitano there was an indication that a claim had been mounted by Mr Tomson for monetary compensation. It said: 'The advice of senior counsel was taken with regard to proceedings for malicious prosecution but it was decided that the preferred course would be to make submissions to the Ombudsman.' At this point, the sequence was: approach members of parliament—quite legitimately; and then seek advice of senior counsel, who presumably put the view—and I do not

know; it is a question you could put to Barwick Boitano—that there would be no chance of success. The next attempt was to put submissions—

**CHAIR**—I am sorry?

**Mr Woodward**—It said, ‘The advice of senior counsel was taken with regard to proceedings for malicious prosecution but it was decided that the preferred course would be to make submissions to the Ombudsman.’

**CHAIR**—But it does not say anything about what the advice was.

**Mr Woodward**—No.

**CHAIR**—That was your interpolation.

**Mr Woodward**—The point that we have made on a number of occasion is that, if there was an opportunity to use legal processes, why wouldn’t you?

**CHAIR**—I can think of a lot of reasons. They are called dollars.

**Mr Woodward**—What I am saying is that—

**CHAIR**—There is a \$50,000 walk up start.

**Mr Woodward**—The approach was: members of parliament, then senior counsel, then the Ombudsman. The letter says, ‘The Ombudsman took the view that we should first attempt to engage in direct negotiations with the director-general.’ Then comes the paragraph that I read out to you before, which covered the points that I had made about the aim of it all being a multimillion dollar compensatory payment and the difficulty that I or anyone else in the department would have in making a recommendation that would lead to a multimillion dollar payout. Therefore, the next avenue—and I am surmising from this point—would be to have a major public expose on a program like *60 Minutes* and to have a parliamentary inquiry. That is as I see the sequencing.

**CHAIR**—I am going to correct you very seriously right there. The establishment of this inquiry had nothing to do with *60 Minutes*.

**Mr Woodward**—I was not suggesting that.

**CHAIR**—The decision was taken by this committee on its merits that it was worth having this inquiry. The Law Council of Australia already had a view on the record, it was reported on, we had a private briefing and this committee took a proper decision to have an inquiry into averments. I really will not have it said that it was done for a television program.

**Mr Woodward**—If I inferred that, I apologise. What I was attempting to explore was the sequence of events, including the seeming reluctance on the part of Mr Rodda and presumably Mr Tomson—and I am not sure to what extent Mr Tomson has actually been involved in that, because he has hardly said any words at all today—to pursue the obvious course of legal action.

But there were a whole series of other avenues pursued, including, given that this inquiry is now under way, to put a submission, which quite properly Mr Rodda did. It has been the focus of the discussion so far—95 per cent of the discussion that has taken place over the last two days has been in relation to the Tomson case and very little in relation to averments.

**CHAIR**—Precisely.

**Mr MURPHY**—Chair, could I ask Mr Rodda on that point made by Mr Woodward: why was legal action not taken?

**Mr Rodda**—Mr Tomson is broke.

**Mr MURPHY**—I know that.

**Mr Rodda**—It costs money to litigate. He does not have any. He cannot afford to take any matters to court.

**Mr MURPHY**—Is there no hope of getting pro bono assistance?

**Mr Rodda**—No. I have raised the issue with a number of lawyers and, apart from the QC that gave us the advice on the malicious prosecution matter, no-one has offered to do anything on a pro bono basis—apart from myself and Mr Barwick, of course.

**Mr CADMAN**—Are you going to provide that information about Bellew?

**CHAIR**—Yes.

**Mr CADMAN**—We have discussed the context of that inquiry. Returning to the process of the raising of the averments, as I understand it, the evidence was gathered within the department and Mr Hung signed off on the averments. He, as I understand the evidence, is—or was at that time—a public servant who had no particular legal background. I would like to know under what circumstances a public servant would swear to something as significant as an averment which would be taken into court unless he was strongly legally advised that he should sign those averments. There were six of them and three of them are very significant in this inquiry into averments.

**Mr Woodward**—We will need to check Mr Hung's background. There are many people who operate close to the legal world who do not have legal qualifications.

**Mr CADMAN**—I understand that. It might be a case of just shoving it under his nose and saying, 'Please sign this,' or he may have reasoned argument provided by the Attorney-General's Department or legal officers within Customs or outside advice saying that there is sufficient evidence for you to sign these averments and they are constructed in such a fashion that we think there is good reason to go ahead with a court case. I would remind you that they are pretty significant when, in three averments, the claim is that false statements had been made.

**Mr Woodward**—We will check it and provide the information to you. Our understanding is that he worked in the legal services area of our regional offices. He may well not have been—probably was not—legally qualified but, as I said, there are others who—

**Mr CADMAN**—As best as you can deduce it, could you find out how he was advised for that period? I would also like to understand the current process for making averments.

**Mr Daley**—I can probably venture an explanation, subject of course to checking the actual details of Mr Hung. My understanding is that Mr Hung is part of the legal services section within the New South Wales Customs Service. That section was effectively involved in compiling the briefs. They received the information from the investigations officers. They compiled a brief, instructing either AGS or the DPP. So he would be aware of all the evidence. He would receive the advice from the lawyers and presumably have to satisfy himself when he signs the document that there is evidence to support the averments which have been drafted. The policy as we have indicated in earlier submissions is that an averment will not be made unless there is some substantive evidence to support the making of the averment.

**Mr CADMAN**—I would like to know what that was. No doubt it is part of the papers coming forward. We will find that out, won't we?

**Mr Daley**—Certainly, the material that was obtained prior to the lodging of the informations included information obtained from Mr Prelea and the other information relating to price that we have identified. There would have been that material to support those three averments, for example, which you have just referred to.

**Mr CADMAN**—Some of the grounds used in making the averment, as I understand it, are given on page 12 of your presentation to us today. There you deal with the details of the Mr Tomson's remittance on the value of shipments going out of Australia and coming into Australia. The third dot point in particular on that page covers those facts. It seems to me that you refer to years which cannot really be related to each other. In one instance you talk about remittances between 1985 and 1986, and further down is the total between 1985 and 1987 where you say that a million dollars has gone out but that for the same period only \$109,000-odd was imported. In another place you refer to the period between 1984 and 1987. I worry when people use different periods to prove different things. I would like to see year by year what went out and what came in for the period from 1984 through to 1987.

**Mr Woodward**—We may not have that information.

**Mr CADMAN**—It is pretty smart work to produce these figures on selective years, I would have thought.

**Mr Woodward**—That was information that we gleaned from the files at the time. If there is more information we will certainly give it to you. But can I emphasise that we have attempted in that part—and I think we listed 10 points—to draw out the view that it was reasonable in all of those circumstances, against the history of it, for action to have been taken.

**Mr CADMAN**—I understand the logic behind your argument.

**Mr Woodward**—I understand your point. I simply do not know. I think we provided the information we had, and we cannot retrospectively go back, unless Mr Tomson is willing to expose his records to us, to draw out that particular material. We will have a look to see what we have got, but that is all we can give.

**Mr CADMAN**—I guess I am adverting to the prospect of using selective year quotes to prove a point. That may or may not be the case, but I cannot fathom why these different bases were used to make these statements.

**Mr Woodward**—I have got your point.

**Mr CADMAN**—I noticed that you thought the total remittance of \$1.001 million in the years 1985 to 1987 was a significant feature. I would have thought that was a significant feature too. What capacity has Customs to investigate the basis of that figure?

**Mr Woodward**—Again I think it was information that was gleaned at the time, and it is reasonably consistent with information that Mr Rodda provided. I think he was talking about a business of \$300,000 a year. The information is reasonably consistent with that. In fact, he may even have used the information as well—I just cannot recall. But it was gleaned from information provided at the time in relation to the investigation.

**Mr CADMAN**—When I see it presented in this fashion, I can understand why Customs might feel that there is a problem here. But I would have to say that the way in which it comes forward to me is that there is somebody who wants to demonstrate that they are a pretty good Customs officer and that they can nail somebody who has a problem. I think that, rather than seeing objective evidence, I am seeing evidence that has been presented in such a way as to gain a result. It is no wonder, in my mind, that the averments were the basis of the case but, at the end of the day, the judge said, ‘Sorry, there’s not enough strength in what you’re saying.’

**Mr Woodward**—Obviously, I understand your view. Looking at the material, we have a different view. Our view, having looked at the papers and listened to Mr Rodda and others, is that the action taken was reasonable in all the circumstances. We will know a bit later and we will hear from you. You asked for one specific piece of information, and I will give it to you now. The amount transferred overseas in 1985 was \$132,217 and a few cents, and the customs value of imports was \$28,614. In 1986, \$484,789 was transferred out, and the customs value of imports was \$49,183—about one-tenth. In 1987, \$384,372 was transferred out, and the customs value of imports was \$31,210.

**CHAIR**—Perhaps you can just table that document; that would be useful.

**Mr Woodward**—We will do that. I will just give you the totals. It was \$1,001,000, which is the—

**CHAIR**—That does not surprise me. If I look at the values vis-a-vis the face value imported and the value that you put on them, the only indication we have is that \$13,000—on the face of the document import value—turned into \$155,000 when valued by Customs for the purposes of security. That is increasing by a factor of 12. So, if you multiply any of those face value figures by a factor of 12, you get up to the sorts of figures you have on the other end of the scale. So that

does not surprise me. I want to go to this question of the importance of the averments to your case. It had moved away; you had changed counsel by the time we got—

**Mr Daley**—Mr Johnson was jammed; I think he was involved in the Chris Flannery inquest, and so Mr Lakatos came into the matter.

**CHAIR**—Your contention is that the magistrate made a finding on Mr Prelea's evidence, and that was enough.

**Mr Daley**—No. My proposition was that the primary evidence that the magistrate relied on in relation to finding a false price in invoices was Mr Prelea's evidence. That was the point I was making.

**CHAIR**—I do not accept that, but let us suppose it is true. If you did not have access to using averments, it would not matter, because they were not relied upon.

**Mr Daley**—For example, averments were used to demonstrate that Mr Hung had the relevant delegations. That issue was not contentious; therefore, the averments stood as evidence, and that was the end of it. So the averments were useful in that instance.

**CHAIR**—All along the way I think you have taken the message, when we took evidence from the Law Council and talked about this, that we think that there is a proper use of averments and a use which is—I will not use the word improper—not a proper use. I will not be quite so strong. Nobody has any problem with averments 1-3; they could still be useful. So—from my point of view at the moment, anyway—I am talking about a modification of the use of the averment power. I think it can be argued that to use it as it is used in 4, 5 and 6—certainly, 4 and 5—which is consistent right throughout the seven and which is to with warrants and summonses, is to mean it to be relied upon. But, to take your supposition that Mr Prelea's evidence was enough, you do not need averments 4, 5 and 6.

**Mr Daley**—In this case, probably not, because the magistrate was happy to rely on the evidence of Mr Prelea in relation to the dispute over the genuineness of the price. So, in this case, that may be so—

**CHAIR**—In any sort of case where there is a dispute about the face value, you ought to be able to prove it in some other way.

**Mr Daley**—I am not sure that you can draw a common rule from it. Customs—or any other prosecutor, for that matter—would normally not proceed on the basis of an averment alone in respect of a disputed point. They would be quite mad to do so, particularly if they had to prove their case beyond reasonable doubt, particularly if they had to prove it to the criminal standard—and that is why the evidence from Mr Prelea was called.

**CHAIR**—When this went ahead in the beginning, nobody expected Mr Tomson to be represented in his defence.



**Mr Daley**—And hence the prosecution came to court ready to be put to strict proof, to call every piece evidence and to prove every document. There was no need to, because the defence conceded there was no need to.

**CHAIR**—But it did not. It came along and said, ‘Oh, we’re terribly surprised to see that he has representation.’

**Mr Daley**—No, Madam Chair. It is quite clear from pages 1, 2 and 3 of the transcript of the first day.

**CHAIR**—Mr Johnson said, ‘We didn’t expect him to be represented.’

**Mr Daley**—Yes. If you go to the supplementary submission, you will see that we have detailed other parts of the transcript where it is quite clear what he was saying. He was saying that they came ready to be put to strict proof and to call every witness on every point. There was no need to, in the end.

**CHAIR**—Not where you were expecting that a rebuttal of that evidence would be called.

**Mr Daley**—It assumed that everything would be put into contest; that is the whole point.

**CHAIR**—Not if he was not going to be represented.

**Mr Daley**—Not everything was put into contest. They came to court assuming—

**CHAIR**—If you had a man coming along who you did not expect to be represented and he spoke virtually no English, you really were not going to expect him to be able to rebut what you call strict—

**Mr Daley**—Hence the need for the prosecution to accept that they would have to prove every point in a strict sense.

**CHAIR**—When he was represented and there was going to be a legitimate contest, all of a sudden witnesses who were going to be called were not called.

**Mr Daley**—No, because there was a concession. The defence conceded that they did not need to be called. That is the point that we have been through already.

**CHAIR**—This is where I think we have a bone of contention. I accept that Mr Grausam was called. There was no cross-examination of Mr Grausam on the overseas documents which they had received that day. I do accept the validity of what Mr Rodda said, who was the only person present at the time. He is a sworn witness—he has sworn to give the truth—and he says that the expectation was that Mr Delmenico would be called and that they could cross-examine him on the foreign documents. I will tell you here and now that I accept that.

**Mr Daley**—Madam Chair, you said before that I was putting forward a supposition. In fact, what I was doing was putting forward what emerges from the transcript. The committee will

really need to read the opening of the trial because it sets out quite clearly what has happened. It sets out quite clearly—

**CHAIR**—I did read what you referred to me.

**Mr Daley**—That is part of it; I mean the whole transcript.

**CHAIR**—I intend to read the whole of it, but I paid attention to the part that you directed me to, where it says that they were not going to report on conversations et cetera. I do not consider that to be a statement that they were not going to call Mr Delmenico. I am sorry; I just do not.

**Mr Vorreiter**—Just on that point, can I complete a point that I was trying to make earlier on the calling of Mr Delmenico. Bearing in mind that there were many days over a substantial period of time—

**CHAIR**—And you were not there.

**Mr Vorreiter**—That is really quite irrelevant.

**CHAIR**—I think it is rather relevant, actually.

**Mr Vorreiter**—I have read the transcript. There were many days over a substantial period of time during which the prosecution led its case. Bearing in mind that Mr Tomson was represented by experienced counsel, once again I make the point that it is simply not believable that, when the prosecution announced that its case was closed, Mr Parnell still thought it important at that point to have Mr Delmenico called to give evidence. Mr Parnell could have jumped up at that point and said, ‘I’m sorry; the prosecution—

**CHAIR**—I said right at the beginning that we are between a rock and a hard place. What you are really arguing is that Mr Parnell was somehow incompetent in what he did.

**Mr Vorreiter**—Excuse me! It is quite the opposite.

**CHAIR**—The case for the prosecution closed. Mr Parnell then had—

**Mr Vorreiter**—That is not how it works, Madam Chair.

**CHAIR**—the decision to make either to prove your case for you or to ask for it to be struck out.

**Mr Vorreiter**—Which he did not, by the way. He conceded that there was a prima facie case against Mr Tomson.

**CHAIR**—Which page?

**Mr Daley**—That might be an important point at which to take you to the transcript. It was the transcript of 20 April 1994, on page 10.

**Mr Rodda**—I was there. We made the submission to ask them for the charges against Mr Keomalavong to be struck out. When the magistrate ruled against us on that, Mr Parnell and I conferred on the question of whether we should then go ahead and seek the striking out of the charges against Mr Tomson on the same basis. Given that the magistrate had already ruled against us on Mr Keomalavong, we thought there was no point in making that submission.

**CHAIR**—Was that Mr Parnell’s advice to you and to Mr Tomson?

**Mr Rodda**—Mr Parnell and I conferred on that. We agreed that there was no point in making those submissions to the magistrate. So we simply chose not to do so. That is why, when Mr Parnell was asked if there were any submissions to be made on behalf of Mr Tomson, the answer was no. We thought that it would be a waste of the of court’s time.

**Mr Daley**—That is a concession in anyone’s terms. They did not make the point.

**Mr MURPHY**—Mr Rodda, today Mr Woodward and his legal advisers have made no concessions whatsoever that Mr Tomson has been treated unfairly. Moreover, they have asserted today that you have not provided any evidence to support your claims in relation to your client. Bearing in mind that we have 10 minutes left here today to take oral testimony and that we have a welter of paperwork before us and more to come, I believe it would be helpful to the committee if you had the right of reply in the next 10 minutes to demolish to the best your ability what has been put forward by Customs today.

**CHAIR**—With respect, I am not going to have that because—

**Mr MURPHY**—We have only 10 minutes. Madam Chair, you have been pursuing a particular line of questioning, and I have a completely open mind on this case.

**CHAIR**—Good.

**Mr MURPHY**—I think it is fair to both Customs and to Mr Rodda on behalf of Mr Tomson that Mr Rodda has an opportunity to say something before we close today.

**CHAIR**—Mr Murphy, I have already said that we are going to come back.

**Mr MURPHY**—Yes, I know that. But this is now fresh in our minds.

**CHAIR**—I have said that Mr Rodda is entitled to go away and read the information provided by Customs and that Mr Woodward, Mr Daley and Mr Vorreiter are entitled to read what Mr Rodda has provided.

**Mr MURPHY**—I accept that. With respect, I will leave it to Mr Rodda. This is an opportunity, Mr Rodda. You can choose not to say anything at this stage, and I will accept that. I am giving you the opportunity in the few minutes that are left to say something if you want to, because this is fresh in our minds.

**Mr Rodda**—The only observation I would make is that a lot of what Customs have said today has been dealt with in the submission that I presented this morning. I have made observations

about comments made in particular Customs files. I have attached the various extracts from those files and identified the source in the chronology that was filed this morning. To some extent, the answers to those issues have already been placed before you. In relation to the other matters that were raised today, I would like to have a look at the transcript before I respond, for the very simple reason that I think what is happening here today is that Customs are making a fairly selective presentation of the material that is available to them from their own files. The impression being left with the committee from what has emerged today is, in my view, misleading. I can rebut the various propositions that have been put forward, but I would like to do it in a comprehensive way rather than on the run.

**CHAIR**—Thank you to everybody today. It has been a fairly full-on exchange, and I think that this sort of issue deserves that sort of rigour. Because there is so much information that we have to go away and digest, we need to reconvene on another day. Mr Woodward, I understand you are going to be away.

**Mr Woodward**—I will be away for all of August. I would hate to have to leave an acting head to front the committee. So if it could be left—

**Mr MURPHY**—We will be reading until Christmas, if we read all this.

**CHAIR**—We accept your point of view, and I think that is fair. We will make a time which is convenient to everybody and which allows us time to digest the information put to us today.

Resolved (on motion by **Mr Murphy**):

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.

**Committee adjourned at 3.55 p.m.**