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Submission 4.4

BY:



Australian Government
Australian Customs Service

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

5 Constitution Avenue
CANBERRA CITY ACT 2601

6 February 2004

Dear Ms Gould

SUPPLEMENTARY SUBMISSION TO THE AVERMENTS INQUIRY

I refer to the present inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into the use of averments in Customs legislation. Attached is a Supplementary Submission from Customs, being advice from the Acting Solicitor-General, Henry Burmester QC, concerning the relevance of the Tomson Case files to this Inquiry.

Of particular note are the following comments from the advice:

"It is, therefore, my assessment that in the Tomson case averments had very little role to play in establishing the key elements of the prosecution case. In fact, this case is rather an example of the limited role averments can play in Customs prosecutions for mens rea offences, given averments are limited to matters of fact.

In the light of that conclusion it is clearly open for the Committee to decide that a detailed examination of files and material relating to the Tomson case would serve little purpose in terms of facilitating the Committee's investigation pursuant to its terms of reference relating to the use of averments including in particular cases."

I had also advised in my letter to you of 8 September 2003 that Customs was awaiting advice about its ability to release the Australian Government Solicitor's files to the Committee. That advice has now been received and Customs is presently evaluating it.

Please do not hesitate to contact me on (02) 6275 6087 if there are specific matters on which the Committee would like further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tom Anderson'.

Tom Anderson
Director
Enforcement Operations



Australian Government
Australian Customs Service

HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO AVERMENT PROVISIONS IN
AUSTRALIAN CUSTOMS LEGISLATION

AUSTRALIAN CUSTOMS SERVICE
SUPPLEMENTARY SUBMISSION

6 February 2004



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**Parliamentary Inquiry into Averments
Relevance of Tomson Case Files to Inquiry**

OPINION

I am asked to provide advice to the Australian Customs Service on a particular issue relating to the inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into the use of averment provisions in the *Customs Act*. As part of that inquiry the Committee has received evidence relating to particular proceedings in relation to the investigation and prosecution of Mr Peter Tomson in relation to the importation of clothing in 1987. Customs has appeared before the Committee on two occasions and expects that it may be required to appear again. It has made extensive written submissions to the Committee in response to submissions made on behalf of Mr Tomson concerning the handling of proceedings against him. As result of the proceedings before the Committee I am asked the following specific questions.

Does the Solicitor General agree that the objective evidence indicates that averments were not a material factor in the Tomson case and that accordingly that there is a proper basis for Customs to argue that in its discretion that the Committee should decline to embark on a review of the files?

This question goes not to whether files should be disclosed to the Committee but rather whether there are good discretionary reasons why the Committee should decline to embark on a review of the files. If in the Tomson case averments played at most a negligible role then it is not easy to see how the Committee will be assisted for the purposes of its inquiry by undertaking a review of files in relation to that matter. Any review of the files would rather, in effect, be for the purpose of reviewing or investigating the handling of the Tomson case as such rather than examining the role of averments in Customs prosecutions. While the terms of reference of the Committee provide that the Committee will examine cases that have relied on averment provisions in Australian Customs prosecutions, if the Tomson case is an example where the averment provisions played no significant role at all then it does not seem a suitable case on the basis of which the Committee can examine the use of averments.

In considering this question I have examined the submissions made by Customs to the Parliamentary Committee, in particular its supplementary submission filed on 21 July 2003. I have also considered the transcript of hearings before the Committee. That discloses that at least in the view of the Chair of the Committee there is an assumption that averments played a critical and central role in the Tomson case (Committee Hansard, 24 July 2003, page 138).

In light of the submissions and Committee record, I have examined the terms of the averments and the relevant transcript of the hearing before the Magistrate, as well as the decision of the Magistrate. I refer particularly to pp 3-4 of his decision given on 20 April 1994. That examination leads me to conclude that the averments played very little role in the prosecutions, either in the initial finding that there was a prima facie case or in the ultimate decision that the prosecution had not adequately discharged the burden of proof leading to the dismissal of the charges.

A number of matters can be noticed in relation to the averments. The first is that as a result of submissions, the Magistrate ruled that certain assertions contained in certain of the averments were not statements of fact but of law and were therefore not admissible. In his decision, the Magistrate concluded that an averment that documents were 'false' could not be made in relation to mens rea offences under s 233(1A) and s 234(1A) of the *Customs Act*. There was not the same problem with this type of averment in relation to informations laid pursuant to s 234(1D) and (1E). The Magistrate also rejected use of averments to establish the applicable duty rate as he considered that was a question of law. The averments also did not and could not, therefore, provide great assistance to the prosecution in relation to the more serious offences. Thus, it was not possible on the basis on averments alone for the Magistrate to be satisfied either on a prima facie basis or beyond reasonable doubt that the prices declared were false. That could only be established, and was attempted to be established, through the production of documentary and expert evidence. All offences were tried together so the restrictions on the scope of the averments in some matters affected the way in which the trial was conducted as a whole.

A reading of the transcript where the Magistrate finds there is a prima facie case indicates that he relies on documentary evidence and the evidence of a Mr Prelea to reach the conclusion that, on a prima facie basis, the declared prices were false. Averments are mentioned as to prices (see transcript 20 April 1994 top of page 5). This appears to be for no more than the purpose of establishing the discrepancy in price stated in the relevant documentation and the price paid, but not for the purposes of determining falsity. Considerable evidence was in fact adduced to show this discrepancy but not sufficient to convince the Magistrate to convict.

It is apparent from my instructions and reading of the transcript and judgment that the prosecution put forward evidence to support the elements of the prosecution case, other than the formal matter as to the authority of the Customs officer. In other words it is clear from the way these particular prosecutions were handled that the averments (limited as they were in what they could cover in any event) had very little work to do in making out the prosecution case. Documentary and oral evidence on all of the key elements of the offences was adduced. This evidence was ultimately found by the Magistrate not to be sufficient to establish proof beyond reasonable doubt and the informations were dismissed.

It is, therefore, my assessment that in the Tomson case averments had very little role to play in establishing the key elements of the prosecution case. In fact, this case is rather an example of the limited role averments can play in Customs prosecutions for mens rea offences, given averments are limited to matters of fact.

In the light of that conclusion it is clearly open for the Committee to decide that a detailed examination of files and material relating to the Tomson case would serve little purpose in terms of facilitating the Committee's investigation pursuant to its terms of reference relating to the use of averments including in particular cases.



Henry Burmester QC
Acting Solicitor-General

30 January 2004