



RODDA CASTLE & CO
INTERNATIONAL TRADE CONSULTANTS

Submission 1

OUR REF:

2 May 2003

The Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

RECEIVED
- 6 MAY 2003

Dear Secretary,

BY:

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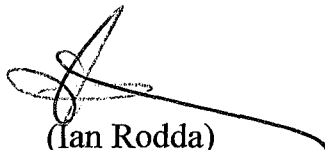
Inquiry Into Averment Provisions in Australian Customs Legislation -
Submission on Behalf of Peter Tomson

At the suggestion of the Chair (the Hon. Bronwyn Bishop), we are forwarding by post a copy of Peter Tomson's formal submission to this Inquiry.

The original of the submission contains numerous documents which are originals, or are copies of documents which are to be regarded as originals. Those documents have been hand delivered to the Chair.

We look forward to presenting, in due course, such further material as the Committee may require.

Yours faithfully
Rodda Castle & Co


(Ian Rodda)
Director



RODDA CASTLE & CO
INTERNATIONAL TRADE CONSULTANTS

OUR REF:

28 April 2003

The Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

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Dear Secretary,

**Inquiry Into Averment Provisions in Australian Customs Legislation -
Submission on Behalf of Peter Tomson**

Further to our letter dated 20 April 2003, we enclose herewith a statement setting out the complaint of Peter Tomson. The statement provides a detailed summary of the facts relating to each of the five import transactions in respect of which charges were laid against him. It also contains a summary of the facts relating to two other shipments of goods which were detained by the Australian Customs Service (ACS) but never returned.

An earlier version of this statement was submitted to the Commonwealth Ombudsman in June 2000 for investigation. The Ombudsman declined to pursue the matter unless the ACS had first been given the opportunity to comment. Accordingly, a copy of the statement was then provided to the ACS. The response of the ACS since that time has been less than satisfactory.

The detailed statement does not contain reference to the specific materials relied upon for the allegation that the averments sworn to initiate the proceedings against Peter Tomson, and which were in fact the only evidence of substance given against him, were false. That material is attached to this letter, and is summarised below.

Evidence Supporting The Allegation of False Averments Being Sworn and Tended in Evidence in the Knowledge They Were False

For reasons that will be apparent, the material attached to this letter was deliberately omitted from the detailed statement. This material explains the basis upon which some of the allegations are made, and provides direct evidence of what was plainly a wilful and deliberate conspiracy to pervert the course of justice. I am in possession of similar evidence to support all of the allegations made in my statement.

The attachments relate to two of the sets of charges against Peter Tomson. The documents comprise the following -

1. page 8 of the transcript of the evidence from Tomson's trial (Attachment A). This document contains the following admissions by the ACS -
 - (i) the Crown expected Tomson to be unrepresented at his trial (a fact which no doubt coloured the approach it took to the presentation of evidence)
 - (ii) the Crown conceded (in effect) that there was little difference between the prosecution and defence on issues of fact
 - (iii) the evidence of Grausam (the ACS investigation officer) would be "very much a matter of sourcing documents and explaining where they came from". Grausam in fact gave no evidence at all regarding these documents, no doubt fearing prosecution for perjury if the true nature of the documents emerged during the proceedings
 - (iv) the Crown concedes that there were no admissions by the defendants.

2. documents relating to the Steady Export Co shipment from Thailand. The ACS apparently believed that this was its strongest case. The prosecution claimed in its opening address to the Court that Tomson had made two payments for the goods, the first payment being the sum of A\$2,462.83 and the second being the sum of US\$1,593.00. See Attachment B, which is pages 12 to 16 of the transcript of evidence from Tomson's trial. The Crown case in relation to the Steady Export Co transaction is set out in Attachment B.

Section D.1 of my statement deals with this transaction.

The material in this set of documents is as follows -

- (i) invoice presented to the ACS showing the amount of A\$2,462.83 as being the sum paid for the goods (Attachment C - Exhibit TH45B)
- (ii) front and back of what was called a "Reg 23A" invoice showing "current domestic value" of the goods and the selling price (A\$2,462.83). Reg 23A invoices were a peculiarly Australian requirement and date back to an earlier customs valuation system that was repealed in 1975. This document shows the domestic

value of the goods as 45,347 baht (Attachment D - Exhibit TH45E)

- (iii) packing list showing quantity of goods shipped, gross and nett weights, and reference number (Attachment E - Exhibit TH45G)
- (iv) front of Thai export invoice and goods declaration form together with English translation (Attachment F - Exhibit TH45T)
- (v) back of same form together with English translation (Attachment G - Exhibit TH45U)
- (vi) front of Thai foreign exchange control form EC 61 together with English translation - please note the translation refers to this document as form LP 61 and not as EC 61 (Attachment H - Exhibit TH45V(a))
- (vii) back of same form together with English translation. This document shows a value for the goods of 41,115.33 baht converted at the exchange rate of 25.81Bht=US\$1.00 as equating US\$1,593.00 - please note the reference to "EC 71" (Attachment I - Exhibit TH45V(b))
- (viii) export invoice showing declared FOB value as US\$1,593.00 (Attachment J - Exhibit TH45W)
- (ix) the Informations containing the false averments, as follows -
 - sec. 233(1)(a) charges - averments 4, 5 and 6
 - sec. 234(1)(a) charges - averments 4, 5 and 6
 - sec. 234(1)(d) charges - averments 4, 5 and 6
 - sec. 234(1)(e) charges - averments 4, 5 and 6.

These are all at Attachment K.

The ACS case was that the sum of US\$1,593.00 shown in Attachments G, I and J was a second payment for the goods additional to the A\$2,462.83 shown in Attachment C.

The ACS case was false - the amount of 45,347 baht was the amount Tomson paid for the goods. That sum equates the A\$2,462.83 declared on the invoice at Attachment C. The amount of 41,115.33 baht shown on Attachment I is the amount left by Tomson in payment for the goods

minus the commission and charges retained by Steady Export Co and the freight forwarding company, Trans Air Cargo, as their fees for preparing the export documentation and completing the various other export formalities.

The information contained in all of the commercial documentation relating to the sale was therefore correct.

3. documents relating to the Cameron Trading Co shipment from Hong Kong. This is the case in respect of which the defence sought dismissal of the charges on the grounds that the Crown had failed to show that there was a case to be answered. (The same submission was to be made in respect of all of the cases). The prosecution claimed in its opening address to the Court that Tomson had paid the sum of HK\$126,620 for the goods, whereas the invoice presented to the ACS at the time of importation showed the amount as HK\$104,070. The Crown's case in respect of the Cameron Trading Co transaction is set out at Attachment L, which is pages 24 to 26 of the transcript of evidence from Tomson's trial.

Section D.6 of my statement deals with this transaction.

The material in this set of documents is as follows -

- (i) proforma invoice showing quantity and intended purchase price of goods as HK\$104,070.00 (Attachment M - Exhibit L5A)
- (ii) invoice presented to ACS showing purchase price as HK\$104,070.00 (Attachment N - Exhibit L5D)
- (iii) packing list showing goods actually shipped (Attachment O - Exhibit L5F)
- (iv) correction to packing list issued by Cameron Trading Co (Attachment P - Exhibit L5K)
- (v) report of results of physical examination of goods by ACS showing quantities received compared with quantities shown on packing list (Attachment Q)
- (vi) Hong Kong export declaration showing declared FOB value of HK\$126,620.00 for goods listed (Attachment R - Exhibit L5S)
- (vii) application for export licence number 6103826 showing declared FOB value of HK\$64,860.00 for goods listed (Attachment S - Exhibit L5V)

- (viii) application for export licence number 6103527 showing declared FOB value of HK\$61,760.00 for goods listed (Attachment T - Exhibit L5X)
- (ix) summary comparing invoice description of goods with description in export licence applications - Annexure 10 of my statement (Attachment U)
- (x) information sworn by Grausam to obtain search warrant (Attachment V)
- (xi) the Informations containing the false averments, as follows -
 - sec. 233(1)(a) charges - averments 9, 10, 11, 12, 13, 14, 16 and 17
 - sec. 234(1)(a) charges - averments 9, 10, 11, 12, 13, 14, 16 and 17
 - sec. 234(1)(d) charges - averments 9, 10, 11, 12, 13, 14, 16 and 17
 - sec. 234(1)(e) charges - averments 9, 10, 11, 12, 13, 14, 16 and 17.

These are all at Attachment W.

The ACS case was that the declared FOB value of the goods shown in the Hong Kong export declaration and applications for export licences was the sum actually paid for the goods. However, as a comparison of the documents plainly indicates, the goods shown in the invoice, packing list and ACS examination report are **not** the same goods shown in the Hong Kong export declaration and applications for export licences. The Hong Kong documents include reference to goods that were not purchased by Tomson and were not shipped to Australia. The ACS confirmed this fact by physical examination of the goods after importation.

There is nothing in any of the material obtained overseas to indicate that the amount shown on the invoice presented to the ACS is not the amount Tomson in fact paid for the goods that were actually shipped to him.

The allegation against the ACS that the prosecution of Peter Tomson in relation to the Steady Export Co and Cameron Trading Co transactions amounted to a conspiracy to pervert the course of justice arises from the following -

- (a) the ACS investigation officer chosen by the ACS as its witness of fact in relation to the various documents put into evidence was the officer who went overseas to obtain those documents
- (b) conversations were conducted in the relevant countries with senior customs officials and with the persons who prepared the documents themselves to establish the true nature of those documents and the purpose for which each document was created
- (c) the ACS investigation officer knew and understood the manner in which Mr Tomson conducted his business with the sellers to him of the various goods he purchased
- (d) despite the above, the ACS charged Mr Tomson with offences under the Customs Act knowing, in each case, that -
 - (i) the so-called "second invoice" showing a value in US dollars for the Steady Export Co shipment was nothing more than a document created for internal exchange control purposes in Thailand and did not in any way constitute evidence of a second payment for the goods, and
 - (ii) the goods shown in the applications for export licences in the Cameron Trading Co shipment were not the same goods imported into Australia by Mr Tomson.

The Response of the Australian Customs Service to the Statement Containing Allegations of Unlawful/Illegal Conduct by Certain Officers of the Australian Customs Service

When the charges against Peter Tomson were dismissed in the Local Court in June 1995, the magistrate made an error of law in relation to the costs order. That matter was taken by Mr Tomson on appeal to the Supreme Court of NSW, which upheld the appeal in mid-1997. The Supreme Court remitted the matter back to the magistrate for redetermination according to its directions. Before the matter could be reheard however, the magistrate became seriously ill and retired from the Local Court bench. The Australian Customs Service (ACS) then offered to Mr Tomson an ex gratia payment of about one third of his legal expenses. He accepted the payment on a 'without prejudice' basis in October 1998.

Being gravely concerned about the failure of the ACS to lead any evidence regarding key documents it put into evidence during the trial, Mr Tomson and myself travelled to Thailand in early November 1998 to interview the same witnesses interviewed by the ACS investigation officer, Mr Grausam.

These interviews were conducted with the persons who had actually prepared the documents. The interviews revealed that the documents said by the Crown Prosecutor to be evidence of second payments for the goods in US dollars were in reality internal exchange control documents used in Thailand to show a 'hard currency' value for goods sold for export. (This confirmed the evidence of an expert witness Mr Tomson called from Thailand during his trial).

The documents were not in any way evidence of a second payment for goods. Any evidence which might have been led in that regard during the trial would have been plainly false and I have no doubt Mr Grausam was well aware of that. I believe this fact explains why the ACS led no evidence regarding these documents during the trial, despite having tendered them and deliberately misrepresented their significance during the prosecution's opening address.

⇒ The attached detailed statement was then compiled over a period of about eighteen months following examination of many thousands of pages of material. It was submitted to the Commonwealth Ombudsman in June 2000 with a request for an independent investigation. The Ombudsman's Office responded that it would not pursue the matter until the ACS had first been given the opportunity to comment.

I then forwarded a copy of my statement to the ACS in Canberra, and advised the Chief Inspector, Investigation of the ACS in Sydney (Mr Ken Duffy) that I had done so. I suggested to Mr Duffy that ACS examination of the matter could be expedited if he and I went over the material together and compiled an agreed statement of facts. He said that was a good idea, but added that he needed to check first with the ACS Central Office in Canberra to obtain its agreement. Mr Duffy then telephoned me on 27 February 2001 to advise that a senior Legal Services Branch officer in Canberra had told him he was not to speak to me in any circumstances.

I understand that at some time around May 2002, the forwarded a brief to advise on the matter to a junior barrister at the Sydney Bar. I was not provided with any information regarding the contents of the brief.

On 15 June 2001, the ACS forwarded to Barwick Boitano (Mr Tomson's solicitors) a list of about fifty questions to which it sought detailed responses. The questions effectively required Mr Tomson to disclose the entire detail of the case against its officers. Barwick Boitano refused to provide the information sought, on the grounds that it would be more appropriate for this material to be placed before an independent Parliamentary or judicial inquiry. The ACS wrote to Barwick Boitano on 7 December 2001, summarising Counsel's conclusions following examination of the matters raised in my statement. At no time during this 'examination' did Counsel attempt to contact either myself (as author of the document) or Mr Tomson (as complainant).

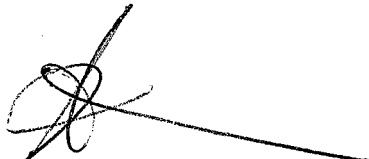
Counsel's 'conclusion' regarding the allegations was that they were "baseless and incapable of being particularised".

This conclusion was said to be drawn from the fact that I had refused to provide the particulars sought (for the reasons stated above). Both I and Mr Tomson's solicitors considered it entirely inappropriate that the detail of the case against the ACS should be delivered to the ACS itself to enable it to act as its own judge and jury. The ACS response is therefore entirely disingenuous.

The ACS also refused to provide to Barwick Boitano a copy of its brief to Counsel or a copy of his findings in relation to the various matters alleged. I should add that I strenuously disagree with Counsel's findings, and state that the summary provided either misrepresents what was alleged, or reflects that Counsel simply misunderstood much of what was claimed (hardly surprising in view of the fact that all of the information relied on for the purposes of his findings was provided by the ACS alone).

I look forward to the opportunity to present such further detail in relation to these matters as the Committee considers appropriate.

Yours faithfully



(Ian Rodda)



RODDA CASTLE & CO
INTERNATIONAL TRADE CONSULTANTS

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28 APR 2003

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20 April 2003

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Dear Secretary,

**Inquiry Into Averment Provisions in Australian Customs Legislation -
Submission on Behalf of Peter Tomson**

This submission is made on behalf of Peter Tomson.

A detailed statement made by me concerning this matter has already been delivered to the Committee Chair, together with other material covering related matters.

This letter formally places on record Mr Tomson's interest in this inquiry. Following is a brief summary of the material contained in the detailed statement.

Background

Mr Tomson was born in Laos, and worked in the apparel trade in that country for fifteen years after he left school in 1965. He migrated to Australia with his wife and children in 1980. In 1984, he decided to set up a small business importing apparel, footwear and other fashion goods from Thailand, Hong Kong and Taiwan. The goods he purchased were items bought as "end of season" clearance stocks at low prices. The goods were purchased from community markets and from small manufacturing enterprises. The business was successful and grew rapidly.

Prosecution of Peter Tomson

In 1987, the Australian Customs Service (ACS) began detaining Mr Tomson's trading stock as it arrived in Sydney. The reason given for the detention was that the ACS was conducting inquiries to determine the customs value of the goods. To obtain trading stock, Mr Tomson started new companies with relatives and family friends, to no avail. All goods imported into Sydney by him and the businesses in which he had an interest were seized or detained

throughout late 1987 and early 1988. A total of five shipments of goods was seized in February and March 1988. Two other shipments detained but not seized were never returned.

Mr Tomson and his brother then commenced importing into Brisbane in an effort to obtain trading stock. Two shipments were delivered. Further problems with the ACS then led to Mr Tomson to decide to cease importing altogether.

Mr Tomson was destitute by the end of 1990. In July 1992, the ACS charged Mr Tomson and one of his business associates (Mr Kongkeo Keomalavong) with a total of twenty charges under the Customs Act. The charges related to the five seized shipments. The trial commenced in July 1993. The various categories of evidence led by the prosecution are summarised in section A.2.4 of my detailed statement. Apart from the averments sworn to initiate the proceedings (and evidence relating to cost of manufacture of the seized goods to which the defence objected on grounds of relevance), none of the evidence was contentious.

At the close of the prosecution case, counsel for Mr Tomson commenced a series of applications to have all of the charges dismissed for lack of evidence. The magistrate adjourned the hearing at the close of the submissions in relation to the first set of charges.

Upon his return to the bench, and without commenting on the evidence presented by the prosecution during the trial itself, the magistrate ruled that a *prima facie* case against the defendant had been established in the averments used to initiate the proceedings. Those averments were, in my opinion, the only evidence before the Court that indicated any wrongdoing on the part of the accused.

The defence was able to show that the averments were false. The question remains as to whether those false averments amounted to perjury and, if so, what consequences should now flow.

I look forward to the opportunity to present detailed proof of these allegations to the Committee.

Yours faithfully



(Ian Rodda)

IN THE HOUSE OF REPRESENTATIVES

**STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS**

**INQUIRY INTO AVERMENT PROVISIONS IN CUSTOMS
LEGISLATION**

SUBMISSION ON BEHALF OF PETER TOMSON

STATEMENT OF IAN RICHARD RODDA

PREAMBLE

Throughout 1987 and 1988, the Investigation Branch of the Australian Customs Service ("ACS") in Sydney conducted a series of investigations into transactions involving the importation of apparel into Australia. The ACS believed that these transactions were part of an elaborate scheme to defraud the Commonwealth of customs duty. Many shipments of goods were seized, and prosecutions commenced against the importers.

One of the importers prosecuted was the Midford company, an importer of shirts for school children. When the matter came to trial (as a committal hearing), the charges were dismissed for lack of evidence. The ACS had spent hundreds of thousands of dollars on the prosecution of the Midford company, and the matter was examined by the Parliamentary Joint Committee of Public Accounts. The Committee published a report containing the details of the evidence given at public hearings and its findings in relation to the matters examined. See "The Midford Paramount Case and Related Matters" - Report No. 325 of the Joint Committee of Public Accounts.

The Executive Summary of the Committee's report noted that, at the same time

that the events reported in the Midford Paramount case were unfolding, a number of other investigations carried out by the ACS were as equally tainted as the Midford Paramount matter itself (paragraph 17, page xxiii). This statement is a summary of the events that took place in another investigation that was carried out contemporaneously with the Midford Paramount case. That other case is referred to herein as the "Tomson Case".

Before proceeding any further with the examination of this statement, it is absolutely critical to an understanding of what follows that the first twelve chapters of the Parliamentary Committee's report be read. Accordingly, we have provided, in a separate annexure, the twelve chapters referred to.

With the exception of one or two officers at the most junior level, the officers involved in the Tomson case were the same officers involved in the Midford Paramount matter. It is not surprising therefore that the criticisms of the Parliamentary Committee that were directed at the ACS in relation to its handling of the Midford Paramount matter apply equally to the Tomson case.

A detailed comparison of the similarities between the two matters appears at the end of this statement. For preliminary purposes however, it is sufficient to note certain findings of the Committee that are of critical importance in both matters. Those findings, as summarised in the Executive Summary referred to above, are as follows -

1. "... that examination was confined primarily to the actions of customs officers in New South Wales and, to a lesser extent, the ACS Central Office" (para. 16, p xxii).
2. "As the Inquiry progressed the Committee discerned an emerging pattern about the investigatory methods and abilities of the NSW based customs investigators. All too often they, along with some Central Office based customs officers, misunderstood or misconstrued the evidence before them, jumped to unsupportable conclusions and ignored or even deliberately suppressed evidence beneficial to or explanations provided by those individuals subject to investigation. It was also evident that at times the ACS actively sought to prevent the provision of such explanations (para 10, p xxi).
3. "Overall, the evidence before the Committee did indicate that the ACS was at best incompetent or, at worst, conspiratorial and deceitful. In this regard, should further evidence emerge demonstrating that the

Committee was deliberately misled, appropriate action will be taken under the full powers of the Parliament” (para 19, p xxiii).

4. “It was observed that the ACS investigators not only lacked understanding and expertise in the matters they were dealing with but, more importantly, these officers failed to recognise their limitations and to seek appropriate assistance where required” (para 22, p xxiv).

Further, in its summary of the inquiry process itself, the Committee made the following observations -

1. “As the Inquiry progressed it became increasingly clear that the cavalier approach to presenting evidence to the Committee by some Commonwealth agencies, both orally and in writing, necessitated closer examination and testing of the accuracy of that evidence. The Committee also found that although these agencies seemly (sic) swamped the Inquiry with voluminous evidence of little or no relevance to the Inquiry, it was an extremely difficult and protracted process to extract from these witnesses the documents and testimony required to properly address the matters at issue (para 1.13, p 4).
2. “Not surprisingly, given the finite resources available to it, the Inquiry eventually reached the point where the Committee decided that it could not continue with the Inquiry. In short, it reached the stage where it could no longer trust the answers provided by the witnesses from the ACS (para 1.14, p 4).

Finally, in the section of its report relating to warnings given to the ACS about the probative value of material to be relied upon by the prosecution, the Committee noted the contents of a minute signed by the then Comptroller-General of Customs -

“[The DPP] then expressed a concern that within our organisation, probably unknown to me, there might have been discussion, actions and/or records which could conceivably be used to embarrass a prosecution. I said that there was only one answer to that. I gave [him] an unqualified assurance that we would not hold back any matter or record that had any bearing on the case. I would be as distressed as the DPP to find things coming to light in a criminal trial that had not been thoroughly aired and discussed by us with the DPP in the development of the Commonwealth’s position” (para 5.26, p 54).

As events revealed in the Tomson case, a substantial amount of evidentiary material which had the potential to be conclusive of the innocence of the accused was concealed from the defence, and not examined until a discovery order was made late in the proceedings. In addition, certain documents which the prosecution apparently intended to rely on during the proceedings were not disclosed to the defendants until the day the hearing commenced.

A. INTRODUCTION

A.1 Person Making Statement

- A.1.1 This statement is made by Ian Richard Rodda of Suite 11A, Level 1, Andrews House, 185 Military Road, Neutral Bay in the State of New South Wales.
- A.1.2 I am a customs and trade consultant by profession, and carry on my business from premises at the above address. I was admitted to practise as a barrister of the Supreme Court of New South Wales in February 1990 although I have not practised at the private bar. I have been the holder of a customs agent's licence since 1979.
- A.1.3 I am adequately qualified to express the opinion contained in this statement. Throughout the period from February 1965 to October 1978, I was employed by the organisation now known as the Australian Customs Service ("ACS"). From mid-1975 until the time of my resignation in 1978, I obtained knowledge of and experience in customs valuation as Inspector and Acting Senior Inspector, Valuation in the ACS in Canberra, and experience as a Senior Investigation Officer in the Investigation Branch of the ACS in Brisbane. My duties in Brisbane also included responsibility for training investigation staff in the conduct of valuation investigation. In 1977, before transferring to Brisbane, I also completed a six-month training course in the conduct of overseas investigation in dumping, valuation and origin of goods. Since leaving the ACS, I have lectured in customs valuation, dumping and the rules of origin for imported goods for the Customs Agents' Licence Course conducted by the NSW Dept of Technical & Further Education and was state examiner in those subjects for two years in 1980 and 1981. I have also lectured in customs valuation investigation technique in the Senior Sergeants Course for the NSW Police Service.
- A.1.4 I first became involved in the matters which are the subject of this

statement in March 1988. I have been retained as an adviser by Mr Peter Tomson and members of his family, and friends of Mr Tomson, at various times throughout the whole of the period since March 1988. The matters referred to are within my knowledge by virtue of that involvement.

A.2 Prosecution and Persecution of Peter Tomson

A.2.1 The purpose of this statement is to set out the details of a failed prosecution, in proceedings spread over two years from 1993 to 1995, of Mr Peter Tomson (formerly Mr Paul Vilaysack) and companies and businesses in which he had a direct or indirect interest. The prosecution related to goods imported by Mr Tomson and his businesses. The prosecution of Mr Tomson was effected through Informations sworn by an officer of the ACS. The goods were imported at various times during 1987 and 1988, and were seized in 1988. Details of the goods seized and the circumstances preceding and surrounding their importation into Australia are set out in an affidavit sworn by Mr Tomson under his former name on 27 June 1988 for the purposes of proceedings brought in the Federal Court of Australia by Mr Tomson and others against the (then) Collector of Customs for New South Wales and others in an unsuccessful attempt to obtain reasons for the decision to seize the goods in issue (Federal Court of Australia Matter No. G1041 of 1988). See Annexure 1. Details of other goods seized by the Respondents and to which this statement relates are set out in other affidavits sworn by Mr Kongkeo Keomalavong on 24 June 1988 (Annexure 2) and Ms Somphet Vilaysack on 24 June 1988 (Annexure 3).

A.2.2 The prosecution of Mr Tomson was initiated and pursued by the Investigation Branch of the ACS in Sydney throughout the period covered by the prosecution of the Midford Paramount shirt company. That particular prosecution, which also resulted in the acquittal of the accused, was the subject of an inquiry by the Federal Parliament. A copy of the first twelve chapters of the report of the Joint Committee of Public Accounts is annexed as a separate document (Report No. 325 - The Midford Paramount Case and Related Matters - hereinafter "the Midford Paramount case"). With the exception of one or two officers at a comparatively junior level, all of the officers of the ACS who were commented upon in scathing terms by the Parliamentary Committee were the same officers involved in the prosecution of Peter Tomson. It is my belief that the findings of the Parliamentary Committee in relation to the behaviour and conduct of the officers involved in the Midford

Paramount case apply, *mutatis mutandis*, to those involved in the prosecution of Mr Tomson. (The report of the Midford Paramount case in fact referred to other wrongful prosecutions carried out at that time). The behaviour of the ACS in relation to the prosecution of Mr Tomson was also the subject of a formal submission by me to the Review of the Australian Customs Service chaired by Mr Frank Conroy in 1994. (My submission was unfortunately given no publicity at the time because the matter was still *sub judice*, notwithstanding that it was apparent to me at the time the submission was made that the defendants in the Tomson prosecution were certain to be acquitted).

A.2.3 It is my opinion that the prosecution of Mr Tomson and the businesses in which he had an interest was malicious, was based on false and fabricated evidence and was never likely to succeed. It is also my opinion, based on material I have examined which was obtained under a discovery order in 1994 in the abovementioned prosecution proceedings, and information provided to me since that time, that the ACS was aware in December 1989, from information it had obtained itself and other information provided by the customs authorities in certain overseas countries, that there was no evidence of any kind of any wrongdoing on the part of Mr Tomson or any of his businesses or any of his business associates in respect of the transactions which were the subject of the prosecution proceedings.

A.2.4 The case against the accused in the prosecution proceedings is summarised at pages 1 to 6 of the transcript of evidence of those proceedings (see Annexure 4). The evidence against the accused fell into six categories, viz -

- (i) documents produced to the ACS containing details of the actual price paid for the subject goods. It was alleged by the prosecution that the prices shown were false and were not the amounts actually paid for the goods by the accused
- (ii) documents obtained in Thailand and Hong Kong, including export licences and export declarations alleged to contain false information
- (iii) "valuation" evidence from a person claimed by the prosecution to be an expert having "very substantial" experience in the purchase of apparel in Thailand, Hong Kong and Taiwan

- (iv) evidence that the accused dealt personally with the suppliers of the subject goods on their own behalf
- (v) evidence that Mr Tomson, over a period of time, sent more money out of Australia than was reflected in the purchase price of goods imported
- (vi) averments sworn pursuant to sec. 255 of the *Customs Act* 1901.

A.2.5 The essence of the Crown case is reproduced at page 5 of the transcript. Mr Johnson for the prosecution stated the matter thus -

“The prosecution case put simply is the two defendants travelled overseas, purchased the goods. It seems two sets of documents were prepared. The false set and the set which were (sic) closer to the truth. The false one came to Australia. The ones disclosing what was in effect the true position, were used overseas and the goods which were brought to Australia whether by reference to the overseas documentary evidence or by reference to the valuation evidence were clearly at such a low figure as to be false”.

A.2.6 The evidence at the trial and other material obtained under a discovery order revealed that the true situation was as follows in relation to each category of evidence referred to above -

- (i) the information contained in the documents produced to the ACS was true and correct in every material respect
- (ii) the information contained in the documents obtained in Thailand was true and correct in every material respect. The information contained in the documents obtained in Hong Kong was true and correct in respect of the purpose for which the documents were created, although that purpose was of no relevance to and not connected in any relevant manner to any issue in respect of which the ACS was required to be satisfied in relation to the actual price paid for the goods by the defendants
- (iii) the “expert” evidence was entirely irrelevant to the material issue of the actual price paid or payable in respect of the subject goods by the defendants

- (iv) the defendants had admitted from the outset that they had dealt personally with the suppliers of the subject goods and, in doing so, did nothing that was unlawful in any way whatsoever
- (v) Mr Tomson sent out of Australia, over a period of about 18 months during 1986 and 1987, approximately \$160,000 more than the value of goods imported. Most of that money was used to purchase machinery and equipment for a timber mill in Laos in which he held a 50% interest. He also retained overseas, from the profits of other businesses in which he had an interest, other monies which were held for investment purposes
- (vi) the averments sworn by the Informant were false in material respects and, to that extent, amount to perjured evidence.

A.2.7 It is my opinion, based on my involvement in these matters and my knowledge of customs law, practice and procedure, that all of the following assertions are true -

- (i) in relation to the goods which were seized or detained throughout 1987 and 1988, in which Mr Tomson had a direct or indirect interest (being goods imported by Thongson Imports and Exports, Vamani Pty Ltd, Lanwren Pty Ltd and Diamond Ville), there was never at any time any basis upon which an officer of the ACS could conclude that he had reasonable grounds to believe that the goods were forfeited goods pursuant to the provisions of sec. 203 of the *Customs Act* 1901.
- (ii) in relation to the goods which became the subject of the proceedings in the Local Court in Sydney throughout 1993, 1994 and 1995, there was never at any time even the slightest possibility that it would be found that the Crown had proved beyond reasonable doubt that the defendants were guilty of an offence.
- (iii) all of the evidence presented to the court by the prosecution in the abovementioned proceedings was fabricated, and fell into one of two categories, viz -
 - (a) evidence which was demonstrably false, having regard to all the facts, and

- (b) evidence which, by being presented in a manner which was calculated to deceive the court, might have given rise to a presumption of guilt but which was, in reality, evidence which was conclusive of the innocence of the accused once seen in the context of the totality of the activities which gave rise to the proceedings.
- (iv) that the officers who conducted the investigation into these matters -
- (a) did so with the express intention of securing the conviction of Mr Tomson on charges arising under the *Customs Act* 1901 even though there was no reasonable basis for a belief that he was guilty of any wrongdoing and irrespective of whether a genuine case to answer could be made out on the facts
 - (b) failed to investigate matters in an impartial and objective manner
 - (c) failed in any event to obtain evidence to support what in fact was nothing more than an unfounded and speculative assumption that Mr Tomson had engaged in conduct that amounted to an offence or offences under the *Customs Act* 1901
 - (d) ignored any evidence that suggested or had the potential to suggest that Mr Tomson was innocent of any wrongdoing
 - (e) failed to pursue any line of inquiry which may have shown that Mr Tomson was innocent of any wrongdoing, even when alerted through material provided by overseas customs officers of the necessity and critical importance of doing so
 - (f) refused to provide any kind of genuine opportunity to Mr Tomson to explain any of the matters that were ultimately alleged against him
 - (g) swore a false information to obtain a warrant to search premises occupied or utilised by Mr Tomson

- (h) generally conducted the investigation and prosecution of Mr Tomson and organisations in which he had an interest in a manner so incompetent that no prospect of a conviction was ever possible if the true facts were made known to the court
- (i) generally pursued and persecuted Mr Tomson for no reason other than to destroy his business and his business interests.

A.2.8 It should be noted also that, at some time after the conclusion of the first week of the hearing and prior to the resumption, counsel for the ACS (Mr Peter Johnson) returned the brief. The matter was then conducted on behalf of the ACS by Mr Paul Lakatos of counsel.

B. PROCEDURES FOR DETERMINING CUSTOMS VALUE OF IMPORTED GOODS

These notes are divided into 2 sections as follows -

- . Background to determination of customs values
- . How the reasonable, prudent customs officer determines customs values where he believes there is insufficient evidence of actual purchase price

B.1 Background to Determination of Customs Values

B.1.1 Duties of customs are imposed on most goods *ad valorem* (i.e., as a percentage of value). A uniform system for the determination of value of goods for the purpose of calculating the amount of duty payable and for other customs purposes is found in Division 2 of Part VIII of the *Customs Act* 1901. (The reprint of the Customs Act relevant for present purposes is that operative from 1 August 1987 and it is from that reprint that my references to legislation are taken).

B.1.2 Sec. 156 of the Act relevantly provides as follows -

“... the value of any imported goods ... shall be the *customs value*

of the goods as determined in accordance with this Division”
(my emphasis).

B.1.3 It should be noted at the outset that the responsibility for determining the customs value of any imported goods rests on the shoulders of the Collector of Customs alone. Although sec. 156 is not couched in express terms requiring such a construction, it is clear from a reading of each of the various sections of the Division that only the Collector has the power to “determine” anything. The obligation which is imposed on the importer of goods pursuant to the provisions of the Division is the obligation to provide to the Collector all such information as may be required for the purpose of enabling the Collector to perform his statutory duty.

B.1.4 The first step in determining *customs value* (and that is the only “value” that is relevant for present purposes) is to have regard to the provisions of sec. 157 which defines “customs value of goods”. Sec. 157 (reproduced at Annexure 5) relevantly provides in sub-sec. (1) -

“... the customs value of goods to be valued is the *transaction value* of the goods” (my emphasis).

B.1.5 “Transaction value” is defined in sec. 159 as follows -

- “(1) A Collector shall determine the transaction value of goods in accordance with this section.
- (2) The transaction value of goods is an amount equal to the amount of the *price*, as determined by the Collector, in accordance with the *relevant transaction*, being that price as adjusted to the extent required by sub-section (3). (my emphasis)
- (3) There shall be added to the price referred to in sub-section (2) such amounts as the Collector considers necessary to take account of the following matters:
 - (a) commission or brokerage (not being a fee paid or payable by the purchaser to the purchaser’s agent for the service of representing the purchaser in the

purchase of the goods to be valued where the agent is not the agent of the vendor, or otherwise associated with the vendor except as agent of the purchaser, in relation to the purchase) paid, or payable, by the purchaser in respect of the goods to be valued;

- (b) packing costs or charges, whether for materials or labour or for materials and labour ... incurred by the purchaser in respect of the goods to be valued;”

[Paragraphs (c) to (g) of sub-sec. (3) are not relevant for present purposes but are also reproduced in Annexure 5.]

B.1.6

The expressions “price” and “relevant transaction” are relevantly defined in sub-sec. 154 (1) as follows -

“price”, in relation to goods the subject of a contract of sale, means the aggregate of:

- (a) all payments made, or to be made, directly or indirectly, in relation to the goods by, or on behalf of, the purchaser:
 - (i) to the vendor;
 - (ii) to an associate of the vendor for the direct or indirect benefit of the vendor; or
 - (iii) otherwise for the direct or indirect benefit of the vendor;

in accordance with the contract of sale or with any other contract relating to the purchase of the goods; and

- (b) all payments made, or to be made, directly or indirectly, by or on behalf of, the purchaser;
 - (i) to the vendor;
 - (ii) to an associate of the vendor for the direct or indirect benefit of the vendor; or

- (iii) otherwise for the direct or indirect benefit of the vendor;

under any other contract, agreement or arrangement, whether formal or informal, for the doing of anything to increase the value of the goods;

whether the payment is made in money or by letter of credit, negotiable instrument or otherwise, ... ’

[Paragraphs (c), (d) and (e) of this definition are not relevant for present purposes but are also reproduced in Annexure 5.]

‘ “relevant transaction”, in relation to goods, means;

- (a) where there was one, and only one, contract of sale for the importation of the goods into Australia entered into before they became subject to Customs control and it was also for their exportation from a foreign country - that contract;’

[Paragraphs (b) and (c) of this definition are not relevant for present purposes but are also reproduced in Annexure 5.]

B.1.7

There will be no dispute between the parties in the present proceedings that all of the documentary evidence relied upon indicated that there was only one contract of sale in respect of each of the shipments of goods that were seized. What was not accepted by the ACS was that the amount shown on the invoice as the actual price paid (known in ACS jargon as “MPP” or “money price paid”) was in fact the amount which Messrs Tomson and Keomalavong actually paid to the vendors in each of the respective transactions.

B.1.8

It was the practice in 1987 and 1988 (as it continues to be today) that customs entries for goods were lodged electronically in the ACS central computer from terminals located in the offices of customs agents. Entries are usually but not always lodged prior to the importation of the goods. Customs entries are records of import transactions and contain information relating to the goods such as description, quantity, origin, customs value and rate of

duty applicable. Customs entries also contain other information relating to the import transaction itself including FOB and CIF value of the goods, port of importation, exchange rate applicable to the transaction and date of lodgement of the entry. The information contained in a customs entry is derived from the commercial documents brought into existence as an integral part of the transaction process.

- B.1.9 The ACS did not see the commercial documents relating to each transaction at the time the entry was created in the central computer. However, it was the practice for such commercial documents as were in existence at the time to be presented to the ACS when the goods arrived as part of the process of obtaining release of the goods from customs control. These documents, when presented together with a printed copy of the entry, were known in ACS jargon as a "bundle". If a certain document required by the ACS for the purpose of verifying a particular in the entry had not been presented in the "bundle", the ACS had the power under sub-secs. 38B (2) and (4) of the Customs Act to call for the production of that document. The usual practice was that the ACS would not release the goods until the document in question had been produced or an explanation provided as to why it had not been produced.
- B.1.10 The expression "commercial document" was defined in sub-sec. 38B(7) to be limited only to documents prepared in the ordinary course of business for the purposes of a commercial transaction involving the goods or the carriage of goods. From my own experience, I know that such documents included the invoice for the goods, packing list, inspection certificate, fumigation certificate, ships' bill of lading or air waybill and consular invoice or certificate of origin. Copies of letters of credit or other documents evidencing money price paid were not ordinarily supplied to customs agents for the preparation of customs entries (the invoice was regarded as sufficient for that purpose) but were usually readily available and could be produced at short notice if the goods had already been paid for at the time of importation. Documents evidencing money price paid would of course not be available for examination at the time of importation if the goods had been purchased on a term of credit.
- B.1.11 It will be apparent from the foregoing that the Collector could call

for the production of commercial documents pursuant to sec. 38B for the purpose of verifying the amount actually paid or payable to the vendor in accordance with the definition of “price” in sub-sec. 154 (1). However, if, following the production of commercial documents pursuant to sec. 38B, the Collector decided that the customs value of the goods could not be determined using the “transaction value”, he was obliged to then consider in turn the alternative methods of valuation set out in sec. 157, subject to the caveat provided in sec. 158 describing the circumstances in which customs value could not be determined.

B.1.12 Where the Collector decided that the customs value of the goods could not be determined, sub-sec 157 (8) provided that “the customs value of the goods is such value as the Collector determines”. Sub-sec (9) of that section prohibited the taking into account of certain matters where sub-sec (8) was utilised. Among the matters which the Collector was not permitted to take into account were the cost of production of goods, and arbitrary or fictitious values.

B.1.13 In circumstances in which the money price paid (and hence the customs value entered by the customs agent) for particular imported goods appeared to be extraordinarily low having regard to the prices which other importers were paying for similar goods imported about the same time, and there was no evidence of fraud (i.e., no evidence that the amount shown on the invoice was not the price actually paid or payable), the usual practice was for the ACS to advise the importer that the invoiced amount was too low and that new customs values would be determined pursuant to sub-sec. 157 (8). The new values would be determined by the Collector and the importer advised in accordance with the provisions of sec. 161C (reproduced in Annexure 5).

B.1.14 Where customs values for goods were determined pursuant to sub-sec. 157 (8) with the result that a greater amount of customs duty was imposed than would otherwise have been the case, the importer had the right to pay the duty under protest pursuant to sec. 167 and to apply to the Administrative Appeals Tribunal for review of the decision pursuant to sub-sec. 273GA (2).

B.2 How the Reasonable, Prudent Customs Officer Determines Customs Values Where He Believes There is Insufficient Evidence of Actual Purchase Price

B.2.1 When determining the customs value of apparel, it is essential for officers to be aware of the fact that fashion goods are notorious for significant variations in price over short periods of time. (It was for this reason that the Customs Co-operation Council in Brussels published the study on valuing apparel which was produced by the defence in the proceedings against Peter Tomson and Kongkeo Keomalavong). See Annexure 6.

B.2.2 What should have happened in Peter Tomson's case is as follows:

- (a) officer forms view that the prices shown on the invoices presented in respect of the imported goods are lower than the prices that he would ordinarily expect to be declared for goods of that kind.
- (b) officer calls for production of commercial documents pursuant to sec. 38B to satisfy himself that the prices shown in the invoices were the prices actually paid.
- (c) on completion of examination of documents, officer must conclude that invoice price is to be accepted as prima facie evidence of transaction value and hence acceptable as customs value.
- (d) to protect revenue against possibility of underpayment of duty, officer determines customs values pursuant to sub-sec. 157 (8), relying on expert opinion. The owner of the goods is formally notified of the determination of values pursuant to sec. 161C (1).
- (e) officer issues authorisation for issue of "Print 2" of customs entry with determined values now substituted for the invoiced values. Officer authorises release of goods to owner on receipt of additional duty demanded.
- (f) alternatively, if goods were released prior to the assessment being made, officer issues a demand for duty shortpaid on a "post entry".

- (g) irrespective of whether the officer demands the additional duty under (e) or (f) above, the owner has the option of paying the additional duty demanded under protest, and pursuing the matter in the Administrative Appeals Tribunal. The owner bears the onus of proving that the values assessed by the ACS are wrong.
- (h) if fraud is suspected by the officer at the time the valuation assessment is made, he could also refer the matter to the Investigation Branch. On the facts of matters such as those typified by the Tomson transactions however, no investigation would be required unless the importer failed to pursue review of the demand for additional duty in the Administrative Appeals Tribunal. In any event, such an investigation could commence immediately upon the drawing of samples and the release of the goods to the importer at the time of importation.

C. BACKGROUND TO THE SEIZURES

C.1 The Apparel Trade in South-East Asia

C.1.1 The apparel trade operated on a number of different levels in South-East Asia during the mid to late 1980s. In some countries (such as Singapore, Malaysia, Thailand, Taiwan, Hong Kong and the Philippines), European and North American fashion houses had set up modern, well-equipped factories to manufacture goods for the northern hemisphere markets. The garments manufactured by these factories were invariably produced in accordance with designs owned by the fashion houses.

C.1.2 At a secondary level, other smaller manufacturers in those countries produced "clones", which were copies (with a few slight changes for copyright reasons) of the garments manufactured by the factories from which the major fashion houses purchased their goods. These "clones" were usually of a high standard and were produced for export, often intended for department stores and similar retail outlets in the European and Northern American markets and, to a lesser extent, for similar outlets in Australia, New Zealand, South Africa and South America. In this regard, the decision of the Administrative Appeals Tribunal in *Re: Sussan (Wholesalers) Pty Ltd and Collector of Customs* (1978) 1 ALD

603 provides some useful background information.

- C.1.3 There was also a third level of manufacturing activity in most of these countries in the mid to late 1980s. There were many small “sweatshop” manufacturers who also manufactured “clone” apparel and other apparel, almost entirely for domestic consumption. These manufacturers rarely (and in many cases, never) sold goods for export because, in most cases, they lacked the expertise necessary for foreign trading or were manufacturers who would not be licensed as exporters by the governments of the countries in which they were located. Manufacturers in this third category ordinarily utilised the services of brokers (selling agents) in the event that they were able to negotiate a sale to an overseas customer.
- C.1.4 Another aspect of the apparel trade in South East Asia which should be mentioned is the approach taken to determination of manufacturing costs and hence selling prices for apparel and similar fashion goods.
- C.1.5 At different times throughout the period of three years that I spent in the Valuation, Dumping and Investigation Branches of the ACS, I (like many officers) received training in customs valuation and dumping theory and methodology. Among matters in respect of which I received training was marginal costing for export production, the principal means through which manufacturers can sell goods for export at prices significantly lower than the price at which identical goods are sold on the domestic market in the country of manufacture. The margin of profit made on such export sales can even be higher than the margin of profit made on goods sold domestically, despite the fact that the selling price for export may be significantly lower than the domestic price. The fact that fashion items such as apparel could be sold at prices below the cost of manufacture was well known to customs administrations around the world, and was the subject of a study by the Customs Co-operation Council in Brussels prior to 1975. A copy of that study was tendered to the Local Court in the proceedings against Mr Tomson. See Annexure 6.
- C.1.6 My training in the ACS taught me that a typical “marginal costing” scenario would be along lines similar to the following -
- (a) Major fashion house places order on Hong Kong manufacturer for 10,000 garments of a particular style for the northern hemisphere winter.

- (b) Manufacturer purchases sufficient fabric, yarn, appliqué, etc. to manufacture (say) 11,000 garments prior to commencement of the season. The excess production beyond the ordered quantity might be required for a number of different reasons, including the likelihood that it would be necessary at some time to provide replacements for defective garments, or that further orders might be received. Surplus production could also be due to the fact that some raw material suppliers (such as fabric manufacturers) placed an obligation on customers to order a minimum quantity of raw material stock.
- (c) Manufacturer produces 11,000 garments and sells the ordered quantity (10,000 garments) to the customer *prior to* commencement of the particular season for which the goods are manufactured. Manufacturer delivers 10,000 garments to his customer and sells that delivered quantity at a price that covers the cost of manufacturing the entire production quantity of 11,000 garments. He later supplies (say) 250 garments free of charge under warranty as replacements for defective garments, and also sells the customer a further (say) 500 garments at a reduced price during the particular season to cover a higher than anticipated demand.
- (d) The manufacturer is left at the end of the particular season with a quantity of 250 garments for which he has already recovered full cost to make and sell. It is unlikely that he will sell these garments to a northern hemisphere buyer because the goods are no longer “in fashion”. He sells the remaining garments (or such of them as may be required) to a fashion buyer or buyers of goods for sale in the southern hemisphere as off-season clearances. If the manufacturer is unable to sell the goods to a fashion buyer, the goods are sold as rags or delivered for waste disposal. Goods sold as “out of fashion” garments are sold for whatever price can be obtained and it was to this situation that the Customs Co-operation Council study was specifically directed.

C.2 Mr Peter Tomson

C.2.1 Personal Details

- C.2.1.1 Mr Tomson was born Paul Phone Vilaysack at Pakse, Laos on 13 May 1947. He is married to Kim (formerly Lee Vilaysack) and

has 6 sons, Ken, Steven, Colin, Michael, Sam and David.

C.2.1.2 Paul Vilaysack changed his name to Peter Tomson by deed poll in Sydney on 7 September 1988 in an effort to avoid what he believed was deliberate persecution of him by the ACS. Paul Vilaysack is the person referred to in this document as Peter Tomson.

C.2.1.3 Mr Tomson had worked extensively in the apparel and footwear industry in Laos after completing high school in 1965, and had many friends and contacts within the industry, mainly among small manufacturers. He had an excellent knowledge of all aspects of the apparel trade throughout the South-East Asia region, including knowledge of manufacturing, distribution and sale activity at all commercial levels. The owners or managers of many small manufacturing firms were known to him and some were personal friends. His knowledge of the apparel trade covered trade in Laos, Thailand, Hong Kong and Taiwan in particular. His range of business contacts in those countries was extensive and, after migrating to Australia, he retained apparel brokers in Thailand, Hong Kong and Taiwan as his agents for the purpose of locating garments of good quality at the lowest possible prices. He was a merchant in the apparel industry in Laos at the time he decided to migrate to Australia and, at that time, almost all of the manufacturers from whom he and his agents purchased apparel were small firms who sold only in their local area, either from shops they owned or leased, or from street stalls.

C.2.1.4 Mr Tomson migrated to Australia with his wife and young family in 1980, at the age of 33 years. Four years after settling here, he established a business importing apparel and footwear. The imported goods were purchased from street stalls, small retail outlets and small factories in Thailand, Taiwan and Hong Kong. Mr Tomson sold those goods in Australia initially at the Fairfield markets on weekends, but later leased a retail outlet at Cabramatta (operating under the name New Star Fashions) and sold the imported goods from those premises also.

C.2.1.5 Mr Tomson was a man of considerable means by the time the ACS commenced detaining and seizing his trading stock in mid-1987. At that time, he owned or controlled five retail outlets

for apparel in Sydney, two in Bangkok and one in Taiwan. Mr Tomson's capacity to operate his local businesses profitably was helped considerably by the fact that apparel imported into Australia at that time was subject to import quotas. Mr Tomson had acquired a significant level of quota entitlement through previous import performance (known in ACS jargon as "PIP" quota), and had also purchased quota entitlement from other importers under the quota trading scheme.

- C.2.1.6 In 1985, he purchased a half-interest in a timber mill in Vientiane in Laos, and spent about \$150,000 on new machinery and equipment for that mill over a period of eighteen months or so up to mid-1987. He had also deposited large sums of money with friends overseas with the intention of engaging in joint ventures to expand his business interests, such as the purchase of a handbag factory in Taiwan.

C.2.2 Overseas Purchasing and Importing Activities Generally

- C.2.2.1 Mr Tomson invariably adopted the same practice for most of his import transactions. Because of his extensive knowledge of the apparel industry in South-East Asia, he knew the location in various countries of small factories, small retail outlets and street markets from which he always made his purchases. (I have personally visited and inspected the premises of the Pratunam Markets at Ratchaprarop Road in Bangkok, Thailand from which Mr Tomson made many of his purchases throughout and prior to 1987. This market has over 1,000 stalls, all under cover, and each stall appeared to be no bigger than about 20 square metres in size).
- C.2.2.2 When he first commenced his business importing into Australia, he visited factories, stores and markets himself and negotiated directly with the sellers of the goods to agree on purchase prices. Later, in respect of goods purchased in Thailand, he utilised the services of his friend, Ms Yonnapa Chonwanarat, who acted as his agent in identifying goods he might be interested in buying. Ms Chonwanarat (who is also referred to in documents presented to the court as Ms Yonnapa Saeong, her maiden name) also arranged for him to inspect samples of those goods when he arrived at a place where he intended purchasing stock. Ms Chonwanarat was paid a small commission (a percentage of the

purchase price of any goods purchased by Mr Tomson) as her fee for the service she provided.

C.2.2.3 In Taiwan, he relied on the assistance of some friends (and primarily on the assistance of his good friend, Mr Frank Chien), in identifying goods for purchase and importation into Australia. Mr Chien had been a friend of many years standing and Mr Tomson, at various times, deposited funds with Mr Chien with the intention of entering into business ventures with him, including the proposed purchase of a factory to manufacture ladies' handbags. (Although that particular venture did not proceed, Mr Tomson in early 1988 decided to go ahead with a similar investment in partnership with another friend, Mr Wu Chin Chu. Messrs Tomson and Wu invested in the setting up of a business to sell and distribute handbags by wholesale). By the time the first shipment of Mr Tomson's goods was detained by the ACS in 1987, Mr Tomson had advanced a total of \$81,000 to Mr Chien in respect of the proposed factory purchase. Some of the funds advanced to Mr Chien had however by that time been used for other purposes, including prepayment of freight bills for goods purchased in Taiwan by Mr Tomson.

C.2.2.4 Most of Mr Tomson's apparel and other fashion goods purchases in Hong Kong were arranged through his friend and buying agent, Mr Albert Lin, manager of Gold Vincent & Co and other trading (exporting) companies. Mr Tomson's usual practice in Hong Kong was to ask Mr Lin to locate goods which Mr Lin believed Mr Tomson would consider purchasing, and to arrange for samples of those goods to be delivered to the Gold Vincent premises for inspection by Mr Tomson on his arrival in Hong Kong. The samples were invariably brought in from small manufacturers who were not licensed exporters. In anticipation of a sale being made, Mr Lin would in most instances obtain details of the goods from the manufacturers and apply for export licences before Mr Tomson arrived in Hong Kong.

C.2.3 Import Procedures in Respect of the Goods Imported from Thailand

C.2.3.1 Generally

C.2.3.1.a Some explanation of the procedures adopted by Mr Tomson in

respect of his purchases of imported goods is required to explain the background to the unlawful seizures.

- C.2.3.1.b It was a requirement of the Thai banking regulations in the mid-1980s that all monies brought into the country through the banking system had to be brought to account through the medium of a document referred to as an EC 71 (“EC” meaning “exchange control”). That document constituted a record of the transaction and was required in respect of all deposits exceeding 50,000 baht. Funds deposited using an EC 71 were frequently used by the depositor to pay for goods purchased for export. However, it is my understanding that, once deposited and recorded through the issue of the EC 71, the funds could be withdrawn by the owner for use for any purpose. Goods could also be sold for export on terms of credit provided that a deposit had been made beforehand into a Thai bank and an EC 71 issued prior to the sale, so that the banking authorities had a record of a foreign currency transaction that would cover the selling price of the goods.
- C.2.3.1.c Goods exported from Thailand at this time were also subject to exchange control regulations. Whenever an invoice was raised for the sale of goods to a foreign purchaser, the registered exporter who made the sale (or through whom a sale was made on behalf of an unregistered seller in the circumstances described below) was required to lodge with the Bank of Thailand a form EC 61 exchange control document to show the amount of foreign exchange to be earned by the exporter as a result of the sale. The document was required to show the amount of the selling price in both baht and United States dollars, and the number of the related EC 71. The EC 61 was also required to be supported by an invoice showing the selling price of the goods in both baht and United States dollars irrespective of the actual currency in which the sale had been made.
- C.2.3.1.d A customs export entry was also required to be prepared and lodged with the Thai customs authorities. I believe, from information provided to me in the circumstances described below, that an export transaction would not be approved by the Thai Customs if the selling price shown in that entry was below a level acceptable to those authorities.
- C.2.3.1.e It was also the normal practice in a transaction involving a sale of

goods to Australia, for a registered exporter to apply to the Thai Ministry of Commerce for a Certificate of Origin certifying that the goods were the manufacture of Thailand. In the situations to which the facts of this matter apply, it was the usual practice for the registered exporter to apply for the Certificate of Origin either on his own behalf (if he was also the manufacturer) or on behalf of an unregistered exporter (if that unregistered exporter was the manufacturer). I believe it was invariably the case that, where an unregistered exporter was the person making an export sale, that person was also a small manufacturer ordinarily producing goods in his own factory for domestic consumption.

C.2.3.2 By Mr Tomson Purchasing on His Own Account

C.2.3.2.a It was the practice of Mr Tomson to transfer sums of money to Thailand prior to the commencement of a purchasing trip, to ensure that he had sufficient funds to cover the cost of goods purchased, freight and packaging costs, commissions, and all travel and accommodation costs. Mr Tomson has informed me that these deposits were recorded through the issue of EC 71 documents for all of his purchasing trips to Thailand throughout 1986 and 1987. Mr Tomson also took from Australia with him during 1986 and the first part of 1987 amounts in Australian currency of up to \$5,000.00 per trip.

C.2.3.2.b When purchasing goods himself (as opposed to purchasing through an agent), Mr Tomson would visit the markets he knew (including the Pratunam Markets referred to above) and negotiate directly with the vendors in relation to quantity and price. It would often happen (as the documents tendered in the Local Court clearly indicated) that Mr Tomson would purchase very small quantities only of individual product lines, reflecting the fact that his purchases were invariably "end of run" lines or were (in many cases) merely items left over in the stalls at the end of the season and sold as clearance items. He sometimes purchased goods by weight instead of direct purchase price per garment if his purchases comprised a mixture of good quality garments mixed with factory rejects.

C.2.3.2.c After agreeing on a price with the various sellers, Mr Tomson received from each of them a docket containing details of the items purchased and the price agreed upon. He would then

arrange for the goods to be delivered to or collected by Trans Air Cargo ("TAC"), an airfreight company. Mr Tomson left with TAC funds to cover the total purchase price of the goods he had purchased (and the cost of forwarding them by airfreight to Australia), with instructions to TAC to pay the sellers as the goods were delivered. TAC would pay to each of the sellers the amount shown on the purchase docket, less a small percentage to cover the costs of preparing and lodging the required export documentation. TAC would then perform the following functions in relation to the goods -

- (i) consolidate the various deliveries into a single shipment
- (ii) prepare an invoice for the Australian Customs to reflect the information contained in the sellers' dockets
- (iii) prepare a Reg 23A "declared customs invoice for Australia". (This form was actually redundant and had been since mid-1975. This fact was apparently not known to TAC however, who continued to use it for shipments to Australia after that time, despite the fact that it had been unobtainable from stationers in Australia since mid-1975. TAC overcame that "problem" however by photocopying over and over a photocopy of that document which was in its possession, and used those photocopies on each occasion on which a sale was made to an Australian customer).
- (iv) prepare a packing list containing details of the goods in the shipment
- (v) contact the registered export company nominated by Mr Tomson to advise that company that the transaction was taking place so that the export company could sign and stamp the various documents
- (vi) obtain a Certificate of Origin from the Thai Ministry of Commerce
- (vii) prepare the export documentation necessary to obtain export approval from the Thai Customs Department.

- (viii) prepare the foreign exchange control form (EC 61) for the Bank of Thailand to show the amount of funds to be received from the actual sale of the goods themselves (always shown in baht and US dollars - the amount shown on this form excluded any payments made for services performed in Thailand in relation to the goods). This form would also show, where appropriate, the number of the form EC 71 recording a deposit of funds in a Thai bank sufficient to cover the purchase price (irrespective of whether those funds had in fact been deposited for that purpose and were still available).
- (ix) prepare transportation documentation (air waybill)
- (x) pay to the registered export company a small percentage of the purchase price of the goods as its commission for assisting and lending its name as the "official" exporter in the transaction
- (xi) deliver the goods to the premises of the exporting airline.

C.2.3.2.d I was informed by Mr Siri Varapongsathorn, General Manager of TAC and Mr Suchart Dowyok, Operations Manager of TAC at a meeting at the TAC office in Bangkok on 26 November 1998 that the above procedure was followed in respect of what were referred to in the airfreight industry in Bangkok as "walk-in exporters". It was explained to me that there were many small operators like Mr Tomson who purchased goods for export from stalls and other small manufacturing operations which were mainly run as family businesses producing goods for domestic consumption. Because none of these sellers had the means or the facilities necessary to arrange export transactions, TAC and other freight forwarding companies like TAC would perform the required export services on behalf of the purchaser.

C.2.3.2.e There was one additional matter which was also required to be taken into account, and that was the fact that, under the law in Thailand at the time, export transactions were required to be directed through export companies registered with a Thai Government agency. This was to ensure that all of the required documentation evidencing the transaction was brought into existence, and appropriate advice given to the Thai customs

authorities and Bank of Thailand for exchange control purposes. I was also informed at this meeting that approval for export would not be given by the customs authorities if they considered that the selling price shown on the export documents was too low. (I note that none of the values declared for the shipments of goods exported to Australia on behalf of Mr Tomson were rejected by the Thai customs authorities).

C.2.3.3 By Mr Tomson Purchasing Through a Buying Agent

C.2.3.3.a When Mr Tomson purchased goods utilising the services of a buying agent, his usual practice was to ask his agent, prior to his arrival, to visit the stalls or factories of small manufacturers and to select garments or other items that the agent believed he would be interested in purchasing, and to deliver samples of those goods to the premises of a registered export company. When Mr Tomson then arrived in Bangkok, he would go to the place where the samples were held to inspect them and to select the goods he wished to purchase. He would then go to the premises of the seller of the goods and negotiate quantity, price and delivery arrangements with that person. The goods purchased under these arrangements were then delivered to TAC, together with the purchase dockets, for preparation of the export documentation in the manner described above. TAC would pay to the registered export company a small percentage (up to 2%) of the negotiated selling price as a commission for facilitating the export transaction, and retain a further sum of up to 5% as its fee for the provision of export services.

C.2.3.3.b It also happened throughout this period that Mr Tomson would purchase goods for export from registered export companies if those companies were themselves manufacturers of apparel. The commission referred to above was not paid by TAC if the seller was also the registered export company which facilitated the transaction.

C.2.3.3.c Apart from the above variations to the procedure which Mr Tomson ordinarily followed when purchasing on his own account, the same practices and procedures in relation to the preparation of export documentation and the obtaining of export approvals referred to in C.2.3.2.c above were followed when he purchased goods through a buying agent.

C.2.3.3.d The accuracy of the above information is supported by the statement of Gregory Steffan Grausam at Annexure 7. This statement was apparently sworn for the purposes of the prosecution proceedings against Peter Tomson, but ultimately not tendered.

C.2.4 Import Procedures in Respect of the Goods Imported from Taiwan

C.2.4.1 Generally

C.2.4.1.a Mr Tomson was very familiar with the manufacturing and distribution situation in the Taiwan apparel industry. He knew the location of many stalls and small factories from which he could purchase goods at low prices at the end of a selling season. He was also provided with advice, on a regular basis, on the availability of quality garments at low prices by his friend, Mr Frank Chien and other friends engaged in distribution of apparel. Mr Chien was the owner of a factory which manufactured superior quality fashion goods.

C.2.4.2 By Mr Tomson Purchasing on His Own Account

C.2.4.2.a Mr Tomson's usual practice when purchasing goods in Taiwan was to visit stalls and small factories with which he had had past dealings, or new outlets recommended to him by Mr Chien or other friends. When purchasing on his own account, Mr Tomson would visit the premises of the stall operator or factory owner to examine goods available. He would select what he wished to purchase and then negotiate the price. (Sometimes he would purchase goods by weight rather than by price per garment, a practice confirmed by an ACS investigation officer in a minute dated 27 June 1988 - Annexure 8). He would receive a docket showing the price agreed and would then (on most occasions) take that docket to Winelux Enterprise Co. Ltd ("Winelux") in Taipei. Winelux was an export company having considerable experience in the export of apparel and similar fashion goods.

C.2.4.2.b Winelux was given the name of the seller of the goods and advised that the goods would be delivered to its premises for packing and delivery to Australia. Mr Tomson would leave with Winelux sufficient funds to cover the agreed purchase price, the

cost of packing and delivery (local cartage and airfreight), the cost of document preparation and a small sum to cover Winelux's own costs in undertaking the services required.

C.2.4.3 By Mr Tomson Purchasing Through a Buying Agent

C.2.4.3.a Sometimes Mr Tomson would ask Mr Chien or other friends to act for him as his agent in locating sellers of goods that those persons believed Mr Tomson might be interested in purchasing (this would be organised prior to Mr Tomson arriving in Taiwan on one of his regular trips). Those agents would visit potential sellers of goods and advise Mr Tomson of the location of those potential sellers upon his arrival in Taiwan. It should be noted in this context that, apart from the assistance he provided to Mr Tomson in locating low price goods, Mr Chien had no involvement in the negotiations relating to selling price for any of the goods which Mr Tomson purchased in Taiwan.

C.2.4.3.b Upon his arrival in Taipei, Mr Tomson would then visit the premises of the sellers recommended by his agents, and negotiate purchase prices with those sellers. He would instruct those sellers to deliver the goods to the premises of Winelux. He would then provide to Winelux details of the goods he had ordered, and leave with Winelux sufficient funds to cover the purchase prices agreed. He left it to Winelux to pay the sellers of the goods as they were delivered to Winelux's premises. Winelux would then pack the goods for delivery to Australia and prepare the required documentation. Mr Tomson also left with Winelux sufficient funds to cover the projected freight costs and other expenses associated with the transaction.

C.2.4.3.c As noted above, Mr Tomson and Mr Chien had intended at one time in 1987 to purchase a handbag factory, and Mr Tomson had progressively deposited with Mr Chien the sum of \$81,000 for that purpose. That particular venture did not proceed, although Mr Tomson did proceed later with the purchase of an interest in a handbag factory with another friend, Mr Wu Chin Chu. The monies deposited with Mr Chien were not returned to Mr Tomson immediately after the decision was made not to proceed with the factory purchase. Instead, Mr Chien, at Mr Tomson's request, retained the funds and used some of them to prepay freight costs for Mr Tomson on subsequent buying trips. The remainder of the

funds were returned progressively to Mr Tomson throughout 1988 and 1989.

C.2.5 Import Procedures in Respect of the Goods Imported from Hong Kong

C.2.5.1 Generally

C.2.5.1.a Goods exported from Hong Kong were subject to export duty throughout the period in which Mr Tomson was purchasing goods for export to Australia. The duty was calculated as a percentage of the FOB selling price.

C.2.5.1.b Whenever a sale of apparel or footwear was made for export, the exporter was required to declare, on the Export Declaration Form 2A, the FOB value of the goods. The declaration form defines "FOB value" to be "the cost of the goods to the buyer abroad up to and including the loading of the goods on to the exporting vessel, vehicle or aircraft". The form also states "*the Commissioner of Customs & Excise is empowered to assess the value*" (my emphasis). The purpose of the power given to the Commissioner to assess the value was to ensure that exporters could not minimise export duty payments by selling goods at prices below certain levels. If goods were sold for export at a low price, the exporter was required to declare, in lieu of the actual selling price, the official minimum FOB value for goods of that kind. (That was the practical effect of the Commissioner's power). Exporters (particularly exporters of apparel and footwear) were provided with a document listing the official minimum FOB prices. Apparel was identified in this document under various categories, referred to as the "Commodity Item Code".

C.2.5.1.c It is my understanding, based on information provided by Mr Tomson, that a certain practice developed among the persons and manufacturers (sellers) from whom he purchased goods. The practice was that, at the time his agent expressed to those sellers Mr Tomson's interest in purchasing goods, the agent would apply as soon as practicable on behalf of the sellers for export licences for the goods (to facilitate immediate exportation after the sale had been made). The sellers would provide the descriptions of the goods to be shown in the application form.

Because the goods had usually not been the subject of a contract of sale at this point, it was not possible for selling prices to be shown in the export licence application forms. Further, because the prices Mr Tomson paid for the goods he purchased were frequently lower than the official minimum FOB prices in any event, the FOB value shown in the export licence form was normally the same official minimum FOB value information required to be declared in the Export Declaration Form 2A. I understand that it was not an offence for a manufacturer or other vendor of apparel to sell such goods for export at a FOB selling price lower than the official minimum FOB value.

[It is of vital importance to note in this context that the terms "FOB selling price" and "FOB value" are *not* synonymous. It was its apparent failure to grasp the significance of this fact that led the ACS into error in its prosecution of Peter Tomson.]

C.2.5.1.d As noted above, the prices which Mr Tomson paid for the goods he purchased were usually below the official minimum values, so the FOB values shown on export declarations (Export Declaration Form 2A) presented to the Hong Kong Customs were usually (but not always) higher than the actual selling prices shown on the invoices presented to the ACS. The information in both sets of documents was therefore correct, notwithstanding that the actual selling prices and official minimum FOB values were often different.

C.2.5.1.e One final observation should be made in relation to the export licence application (Export Licence [Textiles] Form 4). This document was required to be lodged prior to export. It was valid for 21 days from the date of issue. Export licences were invariably applied for before the export of the goods and, in cases where a seller was confident that an export sale was certain to be made, applied for before the actual sale of the goods had taken place.

C.2.5.2 By Mr Tomson Purchasing on His Own Account

C.2.5.2.a Mr Tomson's usual practice in purchasing goods in Hong Kong was the same as that utilised in other South-East Asian countries. He would visit stalls and small, family-owned factories which

produced goods for domestic consumption only. He would purchase reject garments and other goods of better quality in the very small quantities available at the end of a selling season. Most of his purchases were made from a market called the "Night Market", so named because it only operated between the hours of 6.00 pm and midnight. Many of the small manufacturers from whom Mr Tomson purchased goods were operators of stalls in the Night Market, and many of Mr Tomson's Hong Kong purchases were made from stalls that were operated on a part time basis by small family businesses.

C.2.5.2.b After selecting and paying for the goods he wished to purchase, Mr Tomson would receive a docket showing the actual selling prices. He would then arrange for the goods to be delivered to the premises of an export company. There they would be packed for shipment to Australia and the necessary export documents prepared by staff of the export company. These documents included the invoice for the ACS (showing quantity, description and selling price) and the documents required by the Government authorities in Hong Kong, such as the export entry. The export company would also obtain from the sellers details of the export licences issued to cover the goods.

C.2.5.3 By Mr Tomson Purchasing Through a Buying Agent

C.2.5.3.a Mr Tomson occasionally asked friends in Hong Kong to notify him if they saw any goods he might be interested in purchasing, and to ask the owners of those goods to hold them pending his arrival in Hong Kong. Mr Tomson would then visit the premises of the prospective sellers and, if he wished to purchase what he saw, he would bargain with them and reach agreement on a selling price. On other occasions, he would ask his friends to request that samples of the goods be delivered to the premises of an export company before he arrived in Hong Kong so that he could examine the goods before deciding on what he wished to purchase.

C.2.5.3.b In situations of the kinds described above, and in anticipation that a sale for export would be made, Mr Tomson usually requested the export company to ask the manufacturer or seller (as the case may be) of the goods to apply for an export licence (Export Licence [Textiles] Form 4) at the time he was first notified

regarding the goods, i.e., before the sale had been made. I am advised by Mr Tomson that this was done to ensure that the goods could be exported without delay once agreement had been reached on the selling prices. Because it was often the case that no sale had been made at the time the export licence was applied for, it invariably happened that the values shown for the goods in the licence application were the official minimum FOB prices, there being no other information available to the licence applicant in relation to the value of the goods at that time. Each of the different kinds of apparel article which was the subject of the application was required to be identified in the application in accordance with its official "Commodity Item Code Number".

C.2.5.3.c

One other matter which should be noted is that it sometimes happened that a manufacturer would apply for an export licence (through Mr Tomson's buying agent) for the particular quantity of goods that it had on offer, but Mr Tomson would not purchase all of those goods. What Mr Tomson usually did in situations where his initial purchase decisions were based on examination of samples was to go to the Night Market to see if he could obtain goods of similar quality and style for a lower price. If he was able to obtain such goods, he would purchase them and deliver them to the manufacturer to be exported to Australia in place of the goods originally offered by that manufacturer. Mr Tomson has assured me that this was a common practice and he believed there was nothing unlawful about it, because the quantity of goods shown in the application for the export licence was always correct at the time the application was lodged and the person shipping the goods was the same person. If the actual purchase prices were lower than the official minimum FOB values, no alterations were required to the information submitted to the Hong Kong Customs authorities. If the actual selling prices were higher than the official minimum FOB values, the authorities were notified accordingly. (To illustrate how this arrangement worked, consider the situation in which a manufacturer at the Night Market applies for an export licence for a quantity of (say) 500 mens' cotton/polyester shirts in anticipation that he would sell that quantity to Mr Tomson. Mr Tomson looks at what the manufacturer offers and decides to buy only 100 of those shirts. He then looks around the Night Market to see what else is available and purchases 400 of the same type of garment from other sellers at that Market. He arranges for those 400 shirts to be

delivered to the manufacturer who applied for the licence and they are delivered accordingly. The manufacturer then takes the whole quantity of 500 shirts to the export company for packing and delivery to Australia and Mr Tomson provides to the export company the details of the actual purchase prices for preparation of the invoice and other export documentation).

C.2.5.3.d By late 1987, Mr Tomson had accumulated sufficient funds in Hong Kong to set up joint venture companies with friends who acted as both buying agents (when required) and as export agents in relation to all of his purchases of apparel and other goods in Hong Kong.

C.2.5.3.e The accuracy of the above information is supported by the statement of Gregory Steffan Grausam referred to above and attached as Annexure 7.

D. THE SEIZED GOODS

D.1 The Steady Export Co Ltd Shipment

D.1.1 In mid-June 1987, Mr Tomson travelled to Thailand and other countries in South-East Asia to purchase apparel and footwear. Prior to his arrival in Bangkok, Mr Tomson asked his buying agent, Ms Yonnapa Saeong, to locate for him in the Bangkok markets any goods which she believed he might be interested in purchasing. (Mr Tomson's recollection is that he primarily directed her to the Pratum Markets, and to the Pratunam Markets referred to in C.2.2.1 above. See also his answer to a question on where he purchased goods in Thailand on page 7 of the Transcript of 1 February 1995). He also asked her to arrange for samples of those goods to be delivered to the premises of Steady Export Co Ltd ("Steady Export") in Sukumvit Road, Bangkok so that he could inspect them when he arrived in Bangkok. Steady Export was an export company licensed for that purpose and acted as selling agent for small unlicensed manufacturers and stall operators who sold goods to foreign buyers.

D.1.2 Ms Saeong did as she was directed and, when Mr Tomson duly arrived in Bangkok on or about 6 July 1987, Ms Saeong met him

at Bangkok Airport and took him to the Steady Export factory to inspect the samples. She also gave him the names of the market stall operators from whom the samples had been obtained.

D.1.3 Mr Tomson decided from the inspection which goods he wished to purchase, and then went to the stalls of the sellers of those goods to negotiate price and quantity. When agreement had been reached on those matters, the stall operator in each case issued Mr Tomson with a docket showing the purchase details (price and quantity). Mr Tomson then instructed the individual stall operators from whom he had made purchases to deliver the goods to the Steady Export premises. (The goods were to be paid for on delivery to Steady Export). On completion of the negotiations, Mr Tomson then returned to Steady Export and left with a senior manager (he believes Mr Damrong Thepbinkane) sufficient funds to pay each of the stall operators as the goods were delivered.

D.1.4 It should be noted here that Mr Tomson's recollection on this point differs to that of Mr Damrong, who was interviewed by Mr Grausam of the ACS on 12 December 1989. Mr Damrong told Mr Grausam that Steady Export had no role in the transaction other than as the registered export company in whose name the transaction was recorded for reporting purposes. Mr Damrong said that TAC had prepared all of the necessary documentation and later sent Steady Export copies of the documents for taxation purposes. Mr Tomson is adamant however that he had had dealings with Steady Export on its own account on at least some occasions because he knew personally the key personnel at Steady Export and has informed me that he did purchase goods from Steady Export from time to time although not on this occasion.

[It is important also to note in this context that Mr Tomson's affidavit of 27 June 1998 sets out his understanding of the events that took place in relation to delivery of and payment for the goods. His affidavit does reflect the instructions he gave to Steady Export. However, it appears from what Mr Grausam was told that the key personnel at Steady Export and TAC changed those instructions without reference to Mr Tomson. It appears that, contrary to Mr Tomson's instructions and

own belief, what may in fact have happened was that Steady Export delivered the sellers' dockets to TAC and left it to TAC to collect the goods and to pay the sellers for them. Although the information given to Mr Grausam differs from that contained in Mr Tomson's affidavit, the different fact situations reflected in the two documents have no effect whatsoever on the issue of the amount that was paid for the goods. Further, it is my view that the information provided to Mr Grausam by the persons interviewed at both TAC and Steady Export confirm the accuracy of the purchase price details contained in the invoices presented to the ACS at the time of importation of the goods.]

D.1.5 Steady Export was also given A\$1,500 as a deposit towards the cost of airfreighting the goods to Australia. Steady Export arranged the freight through TAC. A receipt was given to Mr Tomson for the deposit of A\$1,500. The receipt (which was produced after the goods had been delivered to the Steady Export premises and weighed) also shows the amount of the remainder of the freight costs. This latter sum was later paid direct to TAC by Mr Tomson before 10 July 1987.

D.1.6 All of the goods intended for export had been delivered to the Steady Export premises by 6 July 1987. The various documents required for the export transaction were then produced. These included -

- . an invoice showing the price of A\$2,462.83 FOB which incorporated the information shown on the dockets for the goods,
- . a note indicating that the amount of 45,437.00 baht (equating A\$2,462.83) was the amount given to Steady Export to pay for the goods
- . an invoice showing unit prices for the goods, total purchase price (FOB), number of cartons, gross and net weight of consignment and an origin declaration in the form required by Australian Customs
- . a packing list showing the contents of each carton in the

consignment

- . a "Reg 23A" invoice for exports to Australia (produced in error as this document had not been required since 1975). This document shows the purchase price in baht in the "Current Domestic Value" column and the equivalent amount in A\$ in the "Selling Price" column
- . a certificate of origin issued by the Thai Ministry of Commerce
- . the air waybill (produced by Trans Air Cargo)
- . export declaration for Thai Customs showing the export price of the goods in baht and the equivalent value in US\$
- . exchange control form EC 61 showing the value of the goods in US\$ and the related form EC 71 (if any) showing the reference for funds deposited in the Bank of Thailand prior to purchase of the goods
- . attachment invoice for form EC 61 showing values of individual lines in US\$.

D.1.7 Mr Tomson believed at the time the goods were exported that the various documents brought into existence were produced by Steady Export. It may be the case however that some of them may have been produced in the office of TAC immediately after the goods had been delivered to the TAC warehouse. The reason for this belief is that, as the General Manager of TAC explained to me in November 1998, TAC often prepared export documentation, by arrangement with licensed export companies such as Steady Export, as a service to small "walk-in" exporters like Mr Tomson.

D.1.8 The goods arrived in Sydney by airfreight on or about 16 July 1987, and were entered for home consumption on entry number 1M.7195.0432B. A Query Memorandum (number 1199A) was raised by the ACS, calling for the shipment to be checked against the documents lodged and requiring a sample of each line to be drawn. The goods were ordered not to be released.

- D.1.9 The goods were examined by an officer of the ACS on 22 July 1987 and a cargo examination report prepared by that officer. The examination report recorded that the goods were found to be in accordance with the documents lodged at the time of importation.
- D.1.10 There then followed the issue to Mr Tomson of a series of notices under sec. 38B of the *Customs Act* 1901, including a notice dated 12 August 1987 requesting production of Mr Tomson's complete banking records. The notices were answered by Mr Tomson's solicitors, Pullinger Berecny. (All documents referred to in section D.1 of this statement are reproduced in a separate annexure). It will be apparent from examination of the sec. 38B notices that few of the questions asked were actually relevant to the purpose of sec. 38B. The goods were finally seized on 22 February 1988 and amended Seizure Notices were issued on 15 March 1988. The goods were formally claimed by Pullinger Berecny on 15 March 1988, and the return of the goods on security was requested on 4 May 1988 by Arthur Young, Chartered Accountants. The ACS replied on 5 May 1988 to the Arthur Young letter advising that responses to the matters raised would be forwarded in due course. No effective responses to those issues were received until August 1990.
- D.1.11 In an undated memo prepared in late August 1992, Mr Grausam advised the Senior Inspector Valuation in the ACS that he believed that the customs values for the goods contained in this shipment should be determined in a particular manner. Mr Grausam's view was that the actual price paid for the goods was the amount shown in the invoice presented to the ACS plus the amount in US\$ shown in the attachment invoice to the exchange control form EC 61. Mr Grausam's memo wrongly claims "*we have documentary evidence of two payments for the one shipment*". That claim is false and without substance. There was only one payment made and only one amount paid for the goods. That amount is the amount shown in the documents presented to the ACS at the time of importation. Mr Grausam has entirely misconstrued or misunderstood the purpose of the invoice showing the amount in US\$ attached to the form EC 61. Mr Grausam apparently also attached no significance to the fact that the amount shown in the attachment invoice to the form EC 61 showed a value in baht lower than that shown in the invoice presented to the ACS. The reason for the difference, as explained

above, is that the TAC's commission, being a payment made for services rendered in Thailand, was not part of the sum received for the sale of the goods themselves and was therefore required to be excluded. See Annexure 9.

D.2 The Winelux Enterprise Co Ltd Shipment

- D.2.1 On or about 5 July 1987, prior to the visit to Bangkok referred to in D.1 above, Mr Tomson visited the factory of Winelux Enterprise Co Ltd ("Winelux") in Taipei, Taiwan. Winelux was a company which, among other activities, acted as a selling agent and export agent for small manufacturers and local retail outlets, such as markets. It also sold "seconds" and surplus goods of good quality manufactured by apparel and other fashion goods manufacturers who sold primarily for export. The owner of Winelux, Mr Raymond Lin, was a friend of Mr Tomson's. Prior to his arrival in Taipei, Mr Tomson had arranged by telephone with Mr Lin for samples of apparel and other fashion goods to be displayed for his inspection on arrival. These samples were brought in by Winelux from the premises of the various manufacturers and retail outlets for whom Winelux acted as agent. Winelux sold mainly to small exporters like Mr Tomson.
- D.2.2 Mr Tomson ordered quantities of some of the goods and left with Mr Lin a sum amounting to A\$2,592.00 in payment for the goods, which were to be delivered and shipped to Australia later. He also left the sum of A\$2,000.00 with Mr Lin as a deposit to cover freight costs. (The total freight bill eventually came to less than that amount, but Mr Tomson did not know that at the date of order of the goods). Winelux kept a stock of Thai Airways International air waybills on its premises, and Mr Tomson was given at the time the order was placed the number of the air waybill on which the goods would be shipped to Australia. Winelux then arranged with a freight forwarder, Unitrans Consolidated Inc, to deliver the goods to Australia.
- D.2.3 The manufacturer of the goods purchased by Mr Tomson was Linda Fashion Co Ltd, a company owned by Mr Frank Chien, a close friend of Mr Tomson with whom Mr Tomson had planned a major business venture. Mr Tomson did not purchase the goods in this transaction direct from Linda Fashion Co Ltd because the goods normally sold direct to customers by that company were

too expensive for Mr Tomson, who preferred to purchase “seconds” and “end of season runout” lines from agents like Winelux when doing business in Taiwan. Mr Tomson purchased the goods in this consignment from a market retailer for whom Winelux acted as selling agent.

D.2.4 The goods were shipped to Australia on or about 5 August 1987. A credit was issued to Mr Tomson for the excess amount of the freight prepayment.

D.2.5 The documents forwarded to Australia with the goods were the following -

- . an invoice numbered 841912 showing the price of A\$2,592.00 for the goods. The terms of sale shown were CIF, which was plainly wrong as indicated by the receipts given to Mr Tomson.
- . a packing list relating to invoice number 841912
- . air waybill number 217-3597 3851
- . freight forwarders' house air waybill (Unitrans Consolidated Inc) number 841912

D.2.6 At Mr Tomson's request, Winelux sent to him on 5 August 1987 a receipt for the total amount received in payment for the goods and the cost of airfreight. The receipt indicated that the sum of A\$268.68 was held to the credit of Mr Tomson.

D.2.7 The goods arrived in Sydney by airfreight on or about 7 August 1987, and were entered for home consumption on entry number 1M.7218.1152K. A Query Memorandum (number 1240A) was raised by the ACS, calling for the shipment to be checked against the documents lodged, outside packages marks and numbers to be verified, a sample of each line to be drawn and evidence of “money price paid” to be produced. The goods were ordered not to be released.

D.2.8 On 13 August 1987, the customs agent who lodged entry number 1M.7218.1152K on behalf of Mr Tomson wrote to the ACS to advise that he had calculated the customs value incorrectly on the

entry, and sought permission to withdraw that entry and to lodge a "Print 2" version of it. (Authorisation of a "Print 2" version of an entry is a procedure adopted by the ACS to allow correction of inadvertent errors). The agent explained in his letter that he had accepted from the invoiced terms of sale that the transaction was on CIF terms (thereby requiring the deduction of airfreight charges), notwithstanding that this clearly conflicted with both the air waybill and the freight forwarder's house air waybill, both of which clearly showed "Freight Prepaid", meaning that the terms of sale were FOB.

- D.2.9 The customs agent also contacted Winelux in relation to the error, and an amended invoice showing the correct terms of sale was received by the customs agent on or about 14 August 1987.
- D.2.10 The customs agent lodged the "Print 2" version of the entry on 14 August 1987, but it was not approved for acceptance by the ACS until 28 August 1987.
- D.2.11 The goods were eventually examined by an officer of the ACS on 10 September 1987 in response to the Query Memorandum and a cargo examination report prepared by that officer. The report noted commerce marking infringements in respect of some of the goods examined (ladies handbags).
- D.2.12 A further cargo examination report issued on 1 October 1987 by the ACS indicated that the handbags had been correctly marked as to origin.
- D.2.13 A sec. 38B notice was issued in respect of this shipment by the ACS on 26 October 1987. Pullinger Berecry replied on 17 November 1987, responding to the questions asked. A further sec. 38B notice was issued on 11 November 1987 and a reply forwarded by Pullinger Berecry on 11 February 1988. The goods were then seized by the ACS on 22 February 1988. The goods were formally claimed by Pullinger Berecry on 15 March 1988, and the return of the goods on security was requested on 4 May 1988 by Arthur Young, Chartered Accountants. The ACS replied on 5 May 1988 to the Arthur Young letter advising that responses to the matters raised would be forwarded in due course. No effective responses to those issues were received until August 1990.

D.2.14

Mr Grausam's memo at Annexure 9 claims in two separate statements "*there is no documentary evidence available which shows any specific payment for this shipment apart from that supplied by the false shipper in an effort to justify the value declared to the Australian Customs*" and "*the reason the documents produced to Australian Customs are unreliable is that it has been established that the supposed supplier is a name used by another freight forwarder, Unitrans Consolidated Inc, to facilitate the exportation of goods from Taiwan*". I make three observations in response to these comments -

- (i) Winelux was a registered export company providing the services of a selling agent and export facilitator to small manufacturers and/or wholesalers and retailers. There is, in my experience, nothing unusual or suspicious about this. In fact, many small export businesses throughout South East Asia operate in the same manner.
- (ii) The fact that Winelux also had an interest in Unitrans Consolidated (the freight forwarder) is also entirely unexceptional. It is not unusual at all for entrepreneurial exporting companies to have diverse interests in businesses related to their core activities. The same thing happens in Australia.
- (iii) Mr Grausam's use of emotive expressions such as "false shipper" and "supposed supplier", together with his attempt to attribute improper motives to the activities performed in relation to the goods by the persons referred to, gives a very clear indication of his mindset.

D.2.15

Another of Mr Grausam's observations in this memo is particularly informative. He also states in relation to the Winelux transaction "*we do not have any admissible evidence from overseas in relation to this matter*". This comment, taken in conjunction with the minute at Annexure 8, indicates that the prosecution of Peter Tomson in relation to the Winelux transaction proceeded in the face of recognition by the ACS that it had no evidence whatsoever of wrongdoing on Mr Tomson's part in relation to these goods.

D.3 The Gold Vincent & Co Shipment

D.3.1 On or about 13 July 1987, Mr Tomson visited the factory of Gold Vincent & Co ("Gold Vincent") in Kowloon, Hong Kong. Gold Vincent is an export company owned by Mr Albert Lin, a long-time friend of Mr Tomson. Gold Vincent acted as Mr Tomson's buying agent. On this particular occasion, Mr Lin had, at Mr Tomson's request and prior to Mr Tomson's arrival in Hong Kong, obtained samples of various items of apparel from local vendors and held them in his factory for inspection by Mr Tomson. In anticipation that Mr Tomson would probably purchase the goods in respect of which the samples had been obtained (or other goods of a similar kind), Mr Lin applied for export licences on behalf of the manufacturers (sellers) of the goods around the time he first located the goods. Documents tendered by the Crown in the prosecution of Mr Tomson indicated that these licences had been applied for as early as 7 July 1987, which was six days prior to the date Mr Tomson arrived in Hong Kong. No contract of sale had been entered at this time. The licence applications themselves indicated that it was expected that 20 cartons of goods would be shipped to Australia. However, as the invoice and packing list indicate, a quantity of only eighteen cartons was actually delivered. See Annexure 8 for a summary of the information contained in the applications for the export licences.

D.3.2 Mr Tomson examined the samples and decided which items he wished to purchase. He gave instructions to Gold Vincent to organise collection and delivery of the goods to the Gold Vincent factory in anticipation of negotiating purchase prices shortly thereafter. Gold Vincent prepared a packing list on 13 July 1987 showing the quantity and description of the goods received. Mr Tomson then visited the sellers and negotiated the actual purchase prices. He then passed this information on to Gold Vincent and an invoice showing the actual purchase prices was prepared by Gold Vincent in its capacity as Mr Tomson's agent. The sum of A\$3,266.20 was given to Gold Vincent to pay the sellers. A receipt indicating that the sum of A\$3,266.20 was received by Gold Vincent from Mr Tomson was issued on 25 July 1987. A commission of 5% was also paid to Gold Vincent as its fee for brokering the transaction.

- D.3.3 In addition to the documents referred to above, an airway bill was prepared on 25 July 1987 by Dragon Express International Ltd, the freight forwarder instructed by Gold Vincent to deliver the shipment to Australia.
- D.3.4 The goods arrived in Sydney by air freight on or about 29 July 1987, and were entered for home consumption on entry number 1M.7211.0152B. A Query Memorandum (number 1224A) was raised by the ACS calling for the shipment to be checked against the invoice and requiring a sample of each line to be drawn. The goods were ordered not to be released.
- D.3.5 The goods were examined by an officer of the ACS on 6 August 1987 and a cargo examination report prepared by that officer. The examination report recorded that the shipment had been checked out against the perforated invoices.
- D.3.6 There then followed the issue to Mr Tomson of a series of notices under sec.38B of the *Customs Act* 1901. The notices were answered by Mr Tomson's solicitors, Pullinger Berecny. The goods were seized 22 February 1988. The goods were formally claimed by Pullinger Berecny on 15 March 1988, and the return of the goods on security was requested on 4 May 1988 by Arthur Young, Chartered Accountants. The ACS replied on 5 May 1988 to the Arthur Young letter advising that responses to the matters raised would be forwarded in due course. No effective responses to those issues were received until August 1990.
- D.3.7 Mr Grausam's memo at Annexure 9 correctly states the issues of fact relating to the preparation of the documents for this transaction and the role of the principals. He also makes the observation "*I believe that the figure on the invoice produced to Australian Customs can be considered unreliable and the amount declared to the Hong Kong authorities would be reliable as there would be no advantage or reason to mislead the Hong Kong authorities*". I make two observations in response -
- (i) Mr Grausam omitted to mention the fact that, in respect of most of the goods purchased in this shipment, the applications for the export licences were lodged up to two weeks before the goods even became the subject of a sale

transaction (i.e., before they were purchased by Peter Tomson). The FOB values shown in the export documents are therefore not the actual selling prices of the goods, but the minimum FOB values acceptable to the Hong Kong Customs.

- (ii) Mr Grausam's comment that there would be no advantage or reason to mislead the Hong Kong authorities is just speculative nonsense unsupported by any evidence. He apparently made no attempt to establish the reasons for the difference between the FOB values shown in the export documentation and the selling prices shown in the invoice presented to the ACS. He seemingly attached no significance to the fact that the FOB value declared for goods in a particular export category in an export licence application was always the same amount, irrespective of who the manufacturer or seller was. As events subsequently revealed, the reason for the difference in the amounts shown in the Hong Kong export documents and the invoice presented to the ACS was simple and unexceptional once seen in the context of what actually occurred in the transaction.

D.4 The New Calcutta Store (1969) Ltd Shipment

D.4.1 On or about 20 September 1987, Mr Tomson travelled to Thailand on a buying trip. Prior to his arrival, he had arranged through his buying agent, Ms Yonnapa Saeong, for samples of goods he might be interested in purchasing to be delivered to the premises of New Calcutta Store (1969) Ltd ("New Calcutta"). Mr Tomson went to the New Calcutta premises on his arrival in Bangkok and examined the samples. He was not accompanied by Ms Saeong on this occasion. The samples had been supplied by stall operators from the Pratunam Markets referred to above. Mr Tomson decided from among the samples which goods he wished to purchase, and then visited the stall operators to negotiate purchase prices. Dockets were issued by the stall operators to show the prices agreed.

D.4.2 Mr Tomson then returned to the New Calcutta premises to advise that the purchase prices had been agreed and that he had asked the stall operators to deliver the goods directly to the freight

forwarder, Trans Air Cargo ("TAC") for packing and delivery. He also asked New Calcutta to liaise with TAC in the preparation of the export documentation.

D.4.3 It should be noted that, by this time, three shipments of goods imported by Mr Tomson had been detained by the ACS. He had been starved of trading stock for three months and was beginning to experience cash flow problems in his businesses. He therefore arranged with TAC for the goods to be paid for by Mr Varapongsathorn (General Manager of TAC) as they were delivered by the stall operators and undertook to pay Mr Varapongsathorn within the month by telegraphic transfer of funds from Sydney. The invoice prepared on the New Calcutta invoice reflected this agreement by showing that the terms of sale were "D/P 30 days". He also arranged with TAC a 30 day term of credit for the airfreight costs. Because no further sums were to be paid at the destination in relation to the freight costs, the freight charges were shown on the air waybill as "prepaid".

D.4.4 New Calcutta and TAC then worked together in the preparation of the various documents required for the export transaction, as follows -

- . an invoice dated 22 September 1987 describing the goods and declaring that the FOB price was 81,630.00 baht
- . a "Reg 23A" invoice showing the current domestic value as 81,630.00 baht and the selling price as US\$3,716.30. (It should be noted in this context that the FOB value in Australian currency shown on the entry for the goods is A\$4,442.32)
- . a packing list dated 22 September showing the contents of each carton in the consignment
- . a certificate of origin issued by the Thai Ministry of Commerce
- . the air waybill (produced by TAC)
- . export declaration for Thai Customs showing the export price of the goods in baht and the equivalent value in US\$.

(The baht value is shown as 75,136.09 in this document and as 81,630.00 in the invoice presented to the ACS. The difference between the two amounts is the commission paid to New Calcutta in its capacity of selling agent for the stall operators. It was correctly included in the invoice price of the goods for Australian Customs purposes and correctly excluded from the declared FOB value of the goods for Thai Customs purposes)

exchange control form EC 61 showing the value of the goods in US dollars only. (Note that the declared value in US currency in this document is also lower than the US\$ amount shown in the Reg 23A invoice presented to the ACS. The reason for the difference in the two amounts is the same, i.e., the amount required to be declared for official purposes in Thailand is the amount paid for the goods less any commissions paid to local agents. The information contained in both documents is therefore correct)

the attachment invoice for the form EC 61 showing the FOB value of the goods in US\$

- D.4.5 The goods arrived in Sydney by airfreight on or about 24 September 1987 and were entered for home consumption on entry number 1M.7268.0458K. A Query Memorandum (number 74171) was issued on 29 September 1987, calling for the shipment to be checked out regarding commerce marks. The goods were ordered not to be released.
- D.4.6 The goods were examined by an officer of the ACS on 9 October 1987 and a cargo examination report prepared by that officer. The examination report recorded that the marks and numbers were correctly shown on the invoice and the packing list and the goods were correctly commerce marked.
- D.4.7 There then followed an exchange of correspondence between Mr Tomson and the ACS, culminating in the issue of notices pursuant to sec. 38B. The correspondence and notices were answered by Mr Tomson's solicitors, Pullinger Berecny. The goods were finally seized on 22 February 1988. The goods were formally claimed by Pullinger Berecny on 15 March 1988, and

the return of the goods on security was requested on 4 May 1988 by Arthur Young, Chartered Accountants. The ACS replied on 5 May 1988 to the Arthur Young letter advising that responses to the matters raised would be forwarded in due course. No effective response to those issues was received until August 1990.

D.4.8

Mr Grausam's assessment of the customs value of the goods in this shipment, set out in the memo at Annexure 9, reflects the same ignorance of commercial practice as do his comments regarding the Steady Export shipment. For example, he says in relation to the New Calcutta shipment "*although we can show that the supplier is false we cannot show that the amounts declared to both Australian and Thailand Customs were not paid for the goods*". I make the observation that New Calcutta is a registered export company acting as selling agent for the suppliers of the goods. In my experience, there is nothing "false" about the fact that a selling agent prepares export documentation on its own letterhead. A selling agent is not obliged to provide any kind of declaration to the ACS regarding its role in the transaction, although its commission must form part of the customs value of the goods if excluded from the invoiced purchase price of the goods (not the case in this transaction anyway). I attach no significance to the fact that the documents presented to the ACS and to the Thai customs authorities were prepared by an agent. Not only is this fact not unusual, it is actually what I would expect an agent to do as part of its normal range of services to clients. Nor do I attach any significance to the fact that the documents in this case might have been prepared by the freight forwarder rather than by the export company itself - if the indigenous parties to the transaction arrange between themselves for the documentation responsibilities for "walk in exporters" to be shared in a particular way for the sake of convenience, it is not for the ACS to attribute improper motives to actions which are part and parcel of normal day to day commercial activities in that part of the world. If the information regarding the actual price paid or payable for the goods set out in the commercial documents presented to the ACS is correct, and the information provided to the ACS about payment for the goods is correct, the ACS has a legal duty to accept that information.

D.4.9

The admission by Mr Grausam italicised above makes it clear that the prosecution of Peter Tomson in relation to this transaction

was undertaken in the face of recognition by the ACS that it had no evidence of any kind of wrongdoing on Tomson's part. Again, as with the Steady Export transaction, Mr Grausam apparently fails to recognise the significance of the fact that the amount in baht shown on the attachment invoice to the form EC 61 is lower than the amount shown on the invoice presented to the ACS. He also states at Annexure 9 "*the exchange control document evidences payment of this amount from the proceeds of a previous foreign exchange transaction dated 10/6/30 (1987)*". As explained elsewhere, the deposit of funds into a Thai bank on a form EC 71 places the owner of those funds under no obligation to use the funds to purchase goods for export. Mr Grausam's assumption that reference to an earlier deposit on a form EC 71 in the export documents prepared for this transaction necessarily required use of those funds to pay for the goods in this transaction is entirely wrong and contrary to the facts.

D.5 The Genuine Quality Trading Co Ltd Shipment

- D.5.1 The New Calcutta shipment referred to in section D.4 above was detained by the ACS on 24 September 1987. Mr Tomson had formed the view by this time that the ACS intended to refuse to deliver to him anything he imported, no matter what the circumstances of the transaction may have been. He therefore asked his brother Bouasone and sister Somphet if they would, with his financial backing, start up a company which would import goods in its own name. They agreed and Vamani Pty Ltd ("Vamani") was registered on 13 October 1987. (He also asked his friend Kongkeo Keomalavong to start up another company for the same purpose, as explained in section D.6 below). Vamani imported two or three consignments of goods without any problems with the ACS, but then the shipment described below was detained and ultimately seized in the circumstances described.
- D.5.2 The background to the seizure was as follows. In early November 1987, Mr Bouasone Vilaysack wrote to Ms Kanchana Keomany of Genuine Quality Trading Co Ltd ("Genuine Quality Trading") and asked her to forward to him photographs of any goods which that company believed Vamani might wish to purchase. Ms Keomany responded by sending photographs of some footwear the company had available. The price at which the footwear items

were offered was written on the back of each photograph. Mr and Ms Vilaysack showed the photographs to Mr Tomson to seek his advice on whether the purchase should proceed. Mr Tomson believed that the transaction should go ahead and asked his brother and sister to order the footwear in question. Mr Tomson and his brother then left Australia in late November 1987 to travel to Thailand for the twin purposes of confirming the purchase of the footwear and purchasing other trading stock (apparel) for Mr Tomson's Sydney businesses.

D.5.3 Mr Tomson and his brother were met on their arrival in Bangkok by Ms Saeong, who took them to the Genuine Quality Trading premises to examine the footwear offered earlier and to inspect samples of apparel which Ms Saeong had arranged to be delivered to Genuine Quality Trading by stall operators at the Pratunam Markets. Mr Tomson and his brother then went to the Pratunam Markets to bargain with the stall operators (vendors) on prices for those items Vamani wished to purchase. Dockets confirming the agreed prices were written out by the vendors. Mr Tomson and his brother then returned to Genuine Quality Trading with the dockets and gave them to Ms Keomany. Because Mr Tomson now had a major cash flow problem in his businesses (because of the detention by the ACS of all of the goods he personally had imported into Australia since July 1987), he arranged on behalf of Vamani for the goods to be purchased by Genuine Quality Trading when they were delivered by the vendors, and gave an undertaking that Vamani would pay for the goods by telegraphic transfer on their return to Australia. Genuine Quality Trading then prepared (or had prepared) two invoices for the goods purchased by Vamani, the first being an invoice for the footwear for which it was the vendor, and the second for the items of apparel for which it was the agent of the Pratunam Market vendors.

D.5.4 Mr Tomson and his brother then went to the premises of Trans Air Cargo to arrange collection, packing and delivery of the goods to Australia. TAC arranged delivery via Malaysian Airlines. Mr Tomson and his brother arranged with TAC for credit to be given on the TAC costs, which were to be paid on their return to Australia. (It should be noted that the air waybill shows freight as having been "prepaid". In fact it was not prepaid in the usual sense but was shown as such on the waybill to

distinguish this transaction from those in which the importer must pay the freight costs at the destination to obtain delivery of the goods. Transactions in which the freight costs are payable at destination are identified by use of the term "freight collect" on the waybill).

D.5.5 The documents produced by Genuine Quality Trading and TAC to accompany the goods to Australia were the following -

- . an invoice on Genuine Quality Trading letterhead for the footwear. The FOB purchase price was 30,000 baht
- . an invoice on Genuine Quality Trading letterhead for the apparel items purchased from the Pratunam Market vendors. The FOB purchase price was 245,850 baht. (Mr Tomson believes that the commission received by Genuine Quality Trading was deducted from this amount and the net proceeds only paid to the vendors in accordance with the usual practice in transactions of this kind)
- . a summary invoice in the Reg 23A format showing the total of the two sums on the other invoices. (This may have been prepared by TAC)
- . a certificate of origin from the Thai Ministry of Commerce
- . a packing list describing all goods to be shipped
- . a Malaysian Airline Systems ("MAS") air waybill showing a freight charge of 91,420 baht
- . a TAC invoice for the amount of US\$2,954.15. (This invoice includes the airfreight charge shown on the MAS air waybill converted to US\$).

D.5.6 The goods arrived in Sydney by airfreight on 1 December 1987. The apparel items were entered for home consumption on entry number 1M.7334.1136J. The footwear was entered for warehousing on entry number 1M.7334.1181A. (It should be noted that the customs agent incorrectly showed the FOB price as the CIF price in this document, notwithstanding that the invoice itself clearly stated that the amount shown in the invoice was the

FOB price. No duty was calculated at this point however).

- D.5.7 The footwear was then entered for home consumption on entry number 1S.7337.1229C on 7 December 1987. The customs agent transferred the incorrect FOB price from the warehousing entry and tendered an amount of customs duty that was too low. (The error was discovered later and rectified).
- D.5.8 A Query Memorandum (number 74253) was raised by the ACS in relation to the footwear, calling for a full checkout against produced documents, verification of marks and numbers and evidence of customs value. The goods were ordered not to be released.
- D.5.9 The goods were examined by an officer of the ACS on 14 February 1988 (i.e., more than two months later). A cargo examination report was prepared which showed that the goods were found to have been in accordance with the documents lodged at the time of importation.
- D.5.10 The goods were paid for on 30 December 1987 by telegraphic transfer. On that date, Vamani transferred the amount of 275,850 baht to Genuine Quality Trading through its Westpac account at the Cabramatta Branch.
- D.5.11 The customs agent asked Genuine Quality Trading to confirm the purchase price of the footwear in a faxed request on 4 January 1988. Genuine Quality Trading responded the following day and advised that the FOB price was 30,000 baht as shown on the original invoice.
- D.5.12 Vamani then remitted to TAC on 5 January 1988 the amount of US\$4,109.15 to cover the airfreight charges for the subject shipment and an earlier Vamani transaction (in an unrelated matter) for which British Airways air waybill number 125-9100 1744 had been issued in the amount of US\$1,195.85. The amount of the airfreight cost for the subject shipment, as shown above, was US\$2,954.15. The total remitted was actually US\$40.85 short. A further remittance of that amount was made on 11 April 1988 when the discrepancy was discovered.
- D.5.13 There then followed the issue to Vamani on 31 March 1988 of a

sec. 38B notice. A response to that notice was given by Arthur Young, Chartered Accountants on 6 May 1988. No reply was ever received from the ACS to the Arthur Young letter.

D.5.14 The goods were not released to Vamani and no charges were laid in respect of them.

D.6 The Cameron Trading Co Ltd Shipment

D.6.1 As noted in paragraph D.5.1 above, Mr Tomson in late October 1987 asked his friend, Kongkeo Keomalavong, to become a director of a company which Mr Tomson wanted to start up as an importer of apparel and other fashion goods. Mr Keomalavong agreed, and Lanwren Pty Limited ("Lanwren") was incorporated on 4 November 1987. The other director of Lanwren was Ms Khampheuy Anouhoungheuang, a friend of Mr Tomson's family.

D.6.2 Lanwren imported about four or five consignments of apparel and other fashion items throughout November and early December 1987 without encountering any queries from the ACS.

D.6.3 Mr Keomalavong knew little of the apparel business and Mr Tomson gave him considerable assistance in teaching him the trade. They travelled together on buying trips for Lanwren. In mid-December 1987, Messrs Tomson and Keomalavong travelled to Hong Kong to inspect samples of apparel which Mr Tomson's friend, Albert Lin, had arranged to be delivered to the premises of Cameron Trading Co Ltd ("Cameron Trading"). Mr Lin was the general manager of Cameron Trading. (Cameron Trading had been set up as a joint venture between Messrs Tomson and Lin, partly in an effort to overcome the problems Mr Tomson had been experiencing with the ACS). Messrs Tomson and Keomalavong inspected the samples and decided which goods Lanwren would buy. Because Lanwren was not in a position to purchase the goods at that time, Cameron Trading issued a proforma invoice on 17 December 1987 as an order confirmation. The agreed purchase price for the goods ordered was HK\$104,070.00.

D.6.4 In anticipation that the sale would proceed, Mr Lin applied on 1 February 1988 on behalf of Boo Gie Garment Factory Ltd ("Boo Gie") for an export licence for some of the goods covered by the

order. Boo Gie was the manufacturer of some of those goods. The application for the export licence showed that it was expected that a quantity of 40 cartons of goods would be shipped. The values shown for the goods in the export licence application were, in each case, the official minimum FOB values although, as examination of the documents themselves reveals (as noted in D.6.7 below), the intended selling prices as shown in the proforma invoice were in some cases higher than the official minimum FOB prices and in other cases lower.

D.6.5 On 24 February 1988, Lanwren forwarded to Cameron Trading by telegraphic transfer the sum of HK\$55,258.00 as part payment (deposit) for the ordered goods.

D.6.6 On 2 March 1988, Mr Lin lodged a further application for an export licence for the remainder of the goods covered by the order. The seller of these goods was Mongkok Trouser House ("Mongkok").

D.6.7 A comparison has been made between the prices shown in the proforma invoice and the FOB values shown in the applications for export licence. See Annexure 10. This Annexure reveals the following -

the Boo Gie export licence application includes (inter alia) 111 sets of ladies wool/acrylic suit having a unit FOB value of HK\$130.00. The proforma invoice notes however that what was actually ordered was a total of 111 sets comprising 21 sets at a unit price of HK\$110.00, 50 sets at a unit price of HK\$130.00 and 40 sets having a unit price of HK\$140.00 (i.e., some higher and some lower than the unit FOB value of HK\$130.00 shown in the licence application). Further, the unit FOB value of HK\$150.00 declared for the 47 ladies wool/acrylic coats shown in the export licence application is higher than the selling price for these items as shown in the proforma invoice (i.e., 16 at HK\$120.00, 15 at HK\$132.00 and 16 at HK\$140.00). Compare that with the unit FOB value of HK\$120.00 declared for the 324 sets of ladies wool/acrylic top and skirt included in the export licence application and note that the order was only for 226 sets of this item and the agreed unit price was HK\$125.00. It should be noted also

that the quantity of 10 ladies wool/acrylic dresses included in the proforma invoice was not included in the export licence application.

the Mongkok export licence application indicates that a quantity of 116 ladies wool/acrylic jackets was included in the application. The unit FOB price declared was HK\$60.00. However, the proforma invoice indicates that what was ordered was 42 jackets having a unit selling price of HK\$110.00, 50 jackets having a unit selling price of HK\$120.00 and 24 jackets having a unit selling price of HK\$135.00. The licence application also shows that the declared FOB value for the quantity of 120 gents poly/cotton jackets included in the order was lower than the unit selling price, but the declared FOB value of the ladies poly/cotton blouses and gents cotton jackets included in the order was higher than the unit selling price for those goods.

- D.6.8 The ACS relied on the abovementioned export licence applications as proof of its assertion during the trial that the selling prices shown on the invoice presented to the ACS by Lanwren were false. It is apparent however that no reasonable person could possibly draw such an absurd conclusion from that material.
- D.6.9 The goods were packed by Cameron Trading on 22 March 1988 in 37 cartons. The invoice for the transaction was prepared on 25 March 1988. The consignment was delivered to Sydney by airfreight on or about 27 March 1988. The airfreight costs were paid at the destination.
- D.6.10 Most of goods were entered for home consumption on arrival in Sydney on entry number 1M.8090.0482N. The remainder were entered for warehousing on entry number 1M.8091.0596B. A Query Memorandum (number 45617) was raised by the ACS, calling for the shipment to be checked against the documents lodged, evidence of declared value (sic) to be produced, commerce marks to be verified and a sample of each line drawn. The goods were ordered not to be released.
- D.6.11 The goods were examined by an officer of the ACS on 27 April,

1988 and cargo examination reports prepared by that officer in respect of the goods referred to on each entry. The examination report for the goods entered for home consumption recorded the contents of each carton and noted that one carton (number 32) had not been received. The report also indicates that the total quantity of goods received was less than that invoiced.

- D.6.12 The balance of the purchase price of the goods was forwarded by telegraphic transfer to Cameron Trading on 2 May 1988.
- D.6.13 The goods were seized on 29 September 1988. Arthur Young, Chartered Accountants claimed the goods on behalf of Lanwren on 28 October 1988. The ACS did not respond to the Arthur Young letter.
- D.6.14 Examination of the comments of Mr Grausam at Annexure 9 in relation to this transaction is most informative. Apart from some false and highly defamatory observations made concerning the principals in the transaction itself, Mr Grausam also makes this 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*". 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. He also ignores the facts that (i) the quantity of goods shipped to Australia (as indicated in the packing list) is less than the quantity shown in the export licence applications and (ii) the quantity of goods actually received was less than the amount shown in the packing list. Mr Grausam's italicised statement is therefore utter nonsense and contrary to fact.

D.7 The Thai Facilities of Wearing Company Ltd Shipment

- D.7.1 Messrs Tomson and Keomalavong also travelled to Thailand in mid-December 1987 to purchase trading stock for Lanwren. In accordance with Mr Tomson's usual practice, they were met on their arrival in Bangkok by Ms Saeong, who took them to the

premises of Thai Facilities of Wearing Co Ltd ("Thai Facilities") where samples of goods had been made available for their inspection. Some of the samples were of goods manufactured by Thai Facilities and the remainder had been brought in from the nearby Pratunam Markets.

- D.7.2 Lanwren placed an order for some of the goods manufactured by Thai Facilities. Messrs Tomson and Keomalavong then visited the Pratunam Markets and ordered additional goods from the sellers there. Prices were negotiated with the Market sellers and dockets evidencing the prices were issued. The sellers were instructed that the goods were not to be delivered before late March 1988. Messrs Tomson and Keomalavong then returned to Thai Facilities and delivered the dockets showing the agreed prices to Mr Chukiat Sirisuksakulchai, manager of Thai Facilities, with instructions to prepare the necessary export documentation when the goods were ready for shipment to Australia. A proforma invoice was issued on 22 December 1987 by Thai Facilities as an order confirmation. The Market sellers were instructed to deliver the goods to Thai Facilities but Mr Tomson is not sure whether the goods were delivered there in accordance with his instructions or were delivered directly to Trans Air Cargo for packing and delivery. (The statement of Mr Grausam at Annexure 7 suggests that it was more likely that the goods went straight to TAC).
- D.7.3 Mr Tomson arranged with Mr Chukiat for a 30 day term of credit to be allowed for payment for the goods purchased from Thai Facilities and from the Market sellers. The total purchase price of all goods was 110,660.00 baht.
- D.7.4 Thai Facilities and TAC then worked together in late March 1988 to prepare the necessary export documentation. It appears most of it was prepared by TAC. The invoice for the goods was prepared on 25 March 1988. The packing list and air waybill were prepared the same day. TAC gave Lanwren 60 days credit on the airfreight costs and the air waybill was endorsed "prepaid" to show that the freight costs were not to be collected at destination.
- D.7.5 The goods arrived in Sydney by airfreight on or about 27 March 1988, and were entered for home consumption on entry number 1M.8088.146E. A Query Memorandum (number 45616) was then issued on 30 March 1988 requiring the drawing of samples of the

goods, examination to verify quantities received, the checking of commerce marks and the production of evidence of declared value (sic). Delivery of the goods was ordered to be withheld.

- D.7.6 It is not known if a cargo examination report was ever issued. No copy of such a document has ever been presented to Lanwren.
- D.7.7 Thai Facilities was paid for the goods by telegraphic transfer on 22 April 1988, and TAC was paid for the freight costs on 17 May 1988 by the same means.
- D.7.8 The detained goods were not seized but were never returned to Lanwren. No charges were laid in respect of this transaction.

E. THE DIAMOND VILLE SHIPMENTS

- E.1 By mid-1988, Paul Vilaysack had formed the view that the ACS intended refusing to deliver to him anything that was imported by him or any business associated with him. He decided to change his name by deed poll on 7 September 1988 to "Peter Tomson". His brother Bouasone changed his name also, to "James Hinson". The brothers then commenced an importing business in Queensland, operating under the name "Diamond Ville".
- E.2 They imported one shipment of goods into Brisbane without encountering any difficulties with the ACS. It appears however that, around this time, Mr Grausam discovered that Mr Tomson was now importing apparel into Queensland under his new name and the name Diamond Ville.
- E.3 In mid-September 1988, Mr Tomson and his brother travelled to Thailand to purchase trading stock for Diamond Ville. Mr Tomson had forwarded some funds to cover the costs of the trip to his bank in Bangkok. The deposit had been recorded on an EC 71. In accordance with his usual practice, Mr Tomson purchased goods from the Pratunam Markets and arranged with the sellers for the goods to be delivered to Guys Export Company Ltd ("Guys Export"), a business associated with and operating from the same premises as Steady Export Co. Ltd. The export documentation appears to have been prepared by Trans Air Cargo.

- E.4 Because of the serious cash flow problems he was experiencing at this time, Mr Tomson arranged for Guys Export to pay the Market sellers and to allow him 60 days credit terms for payment. He also arranged a term of credit with TAC in respect of the freight costs. Although Mr Tomson had deposited funds in his bank to cover (inter alia) the cost of purchasing goods, Mr Tomson ultimately was not required to use those funds, and utilised instead the credit facilities that had been made available to him.
- E.5 Mr Grausam had by this time discovered that Mr Tomson was importing goods through Queensland, and provided information relating to the earlier New South Wales transactions to the Investigation Branch of the ACS in Brisbane.
- E.6 The consignment of goods ordered in mid-September 1988 arrived in Brisbane by airfreight on 23 September 1988. They were entered for home consumption on entry number 3X.8271.0153P. The goods were detained by the ACS.
- E.7 Mr Tomson contacted me immediately he became aware that the ACS had not released the goods. I telephoned the Chief Inspector Investigation of the ACS in Brisbane to discuss the matter with him. The Chief Inspector Investigation at that time was Mr Noel Taylor, a former Senior Inspector Valuation in Canberra with whom I had worked for some years in the Valuation Branch. I had always enjoyed an excellent relationship with Mr Taylor on both a professional and personal level. I gave Mr Taylor some details of the problems Mr Tomson had been experiencing in Sydney, and asked him to let me know what, if any, additional information was required to obtain release of the goods. Mr Taylor said he would look into the matter and call me back.
- E.8 Mr Taylor rang back within a day and told me that the detention had been requested by the ACS in Sydney. We then discussed the legitimacy of detention of goods on a speculative basis, and agreed that where consideration was being given to the question of whether imported goods were the subject of an unlawful dealing, every consignment was to be considered on its own merits. Mr Taylor said he would make some further inquiries and advise me of the outcome. He rang me again two or three days

later and told me he was satisfied, based on the information provided to the ACS by the importer, that there was nothing overtly unlawful about the transaction. He said he had ordered that the goods be released.

- E.9 A few days later I received another telephone call from Mr Taylor. He told me that Mr Grausam had been on leave at the time he had been speaking to me about the detention of the goods. Mr Grausam had been advised on his return from leave that the goods detained in Brisbane had been released. Mr Grausam telephoned Mr Taylor and a conversation ensued regarding the release. Mr Taylor told me that Mr Grausam had been very unhappy about the release decision. Mr Taylor then said to me, as well as I can recall, the following or words to this effect -

“Grausam is determined to get your bloke. You’d better tell him not to import anything through Queensland again”.

- E.10 I thanked Mr Taylor for his help and had no further communication with him. I advised Mr Tomson that I had had the discussion with Mr Taylor. Mr Tomson told me that if the ACS was going to make it impossible for him to remain in business, he would cease importing. As far as I am aware, neither Mr Tomson nor any of his businesses nor business associates have imported anything into Australia since that time.

- E.10 When the ACS documents relating to the investigation into Peter Tomson’s importing activities were delivered to him under the discovery order during his trial, it was revealed that the ACS believed that Mr Tomson had made two payments for the goods purchased through Guys Export . The reason for this view was that, although Diamond Ville had forwarded a remittance by telegraphic transfer in payment for the goods within 60 days of importation (in accordance with the credit term stated on the invoice), TAC had also shown on the documents lodged with the Bank of Thailand at the time of exportation the number of the EC 71 under which Mr Tomson had deposited funds prior to his arrival in Thailand on the mid-September 1988 buying trip. The ACS assumed, wrongly, that two payments had therefore been made for the goods. In fact, the funds deposited under that EC 71 were used only for the expenses of the trip (food,

accommodation, travel) and were not used to purchase goods. Mr Tomson has told me that he deposited the funds in anticipation that he might need them to purchase goods on that trip, but then did not draw against them for that purpose once he had negotiated the credit term with Guys Export. Mr Tomson has also told me that he would have been quite willing to explain to the ACS what actually took place if anyone had ever bothered to ask him.

F. THE CHARGES UNDER THE CUSTOMS ACT

- F.1 Mr Tomson and his friend Mr Kongkeo Keomalavong were summonsed in July 1992 and charged with 20 offences under the *Customs Act* 1901.
- F.2 The charges related to five shipments of goods out of a total of seven shipments seized by the Investigation Branch of the ACS in Sydney. In addition, one other shipment of goods imported by Mr Tomson into Queensland was detained by the ACS in Brisbane but released at the direction of the Chief Inspector, Investigation in Queensland despite the efforts of ACS officers in Sydney to have those goods seized also. All of the seizures were unlawful.
- F.3 Details of the seven shipments seized are set out in the affidavits of Paul Vilaysack, Somphet Vilaysack and Kongkeo Keomalavong attached, and in section D above of this statement.
- F.4 Messrs Tomson and Keomalavong were charged, in relation to each of the five matters that were heard in the Local Court, with four different offences under the *Customs Act*, viz -
- (a) smuggle goods [sec. 233(1)(a)]
 - (b) evade payment of duty [sec. 234(1)(a)]
 - (c) make entry false in a particular [sec. 234(1)(d)]
 - (d) make statement untrue in any particular [sec. 234(1)(e)]
- F.5 A summary of the matters alleged against Messrs Tomson and Keomalavong is contained in a brief to counsel dated 23 July 1993 (Annexure 11 - attachments omitted).

- F.6 The charges against the defendants were set out in Informations sworn on 16 July 1992 by the Fourth Defendant. A copy of each of these Informations is attached - Annexure 12. The Informations relating to the charges brought in respect of the shipments from Winelux and New Calcutta Store were amended before commencement of the hearing (Annexure 13). Other amendments were made to the Informations by the Magistrate (Mr Connors) during the hearing.
- F.7 It is important to note that the Informant, in each of the Informations under which the charges proceeded, averred the customs value of the goods so as to justify each of the charges made. By proceeding in this manner, and by refusing to provide to the Defendants at any time during the period of five and a half years preceding the date of commencement of the hearing any information at all in respect of its approach to determining the customs value of the goods in issue, the ACS prevented Mr Tomson from exercising all and any of the rights and protections accorded to him under Divisions 2 and 4 of Part VIII of the *Customs Act* 1901 in relation to disputes concerning the determination of customs value and disputes relating to rate or amount of duty payable in respect of imported goods, i.e., Mr Tomson was effectively prohibited from seeking external review of the ACS decision on the customs value of the goods. (These matters are not reviewable under the *Administrative Decisions (Judicial Review) Act* 1977.

G. THE ASSESSMENT OF CUSTOMS VALUES

- G1 Customs values for the goods which were the subject of the proceedings in the Local Court were averred in the Informations which initiated the proceedings, but no evidence was led by the prosecution during the trial to explain the process by which those customs values had been determined. The prosecution volunteered some information relating to that matter after the close of evidence during the trial but before the magistrate handed down his decision. That information, which was provided to Mr Tomson on 11 January 1995, is annexed hereto as Annexure 9 and has been referred to above. The document is self explanatory.
- G.2 Examination of the document reveals immediately the process adopted in the assessment of customs values. In relation to the Hong Kong shipments for example, Mr Grausam proceeds on the erroneous assumption that the official minimum FOB values declared on the Hong

Kong export documents are the prices actually paid for the goods. For reasons explained elsewhere, that assumption is baseless and entirely contrary to the evidence. Further, it is plain from his summary of the evidence he obtained relating to Mr Tomson's purchasing activities that there is no dispute at all over questions of fact - Mr Grausam simply appears to have found it impossible to accept that anyone can purchase fashion goods for less than the cost of manufacture (and in that regard see the study of the Customs Co-operation Council regarding the valuation of out of season apparel).

G.3 Mr Grausam's approach to assessment of customs values for the goods imported from Thailand can only be described as irrational. The proposition that the "value" of the goods (as opposed to the price actually paid) can be ascertained by adding together the price as shown in the invoice sent to Australia and the value in US\$ in the documents submitted to the Thai customs and banking authorities is simply ludicrous. What approach would he have taken if the currency used in both sets of documents was the same? It was noted in his assessment that the amount shown for the goods in US\$ is a lower amount in baht than the amount shown on the documents presented to the ACS. Why that was so (deduction of selling agent's commission) was explained to Mr Grausam in his interview with Trans Air Cargo representatives in December 1989. It is not explained why he chose to ignore that fact when making his assessment of values. It is also interesting to note from Mr Grausam's assessment document that he concedes that there was never any evidence to show that the amount declared in the invoice presented to the ACS was not the price actually paid for the goods (note b at the foot of the page numbered 13). His statement (bottom of page numbered 14) that "we have documentary evidence of two payments for the one shipment" was patently false. The ACS was never in possession of such evidence.

G.4 It is also clear from Mr Grausam's assessment document that he considers that there is something improper (if not unlawful) in the fact that an importer in Australia should buy goods overseas from street markets and the like rather than from factories. In my experience (which covers over 38 years in all aspects of customs practice and procedure) there is nothing unusual about this practice at all and nor is there anything unusual in the fact that the export transaction itself is arranged through a licensed export company. His comments regarding the fact that Steady Export was not the supplier are meaningless and ignore the fact that selling agents are invariably the persons who prepare invoices

and other export documentation in Asian countries when the seller is not a licensed exporter. The fee charged by selling agents for their service is almost invariably a percentage of the selling price of the goods. In my experience, the Steady Export transaction and the other transactions relating to goods imported from Thailand are unremarkable. What Mr Grausam appears to have lost sight of (if he ever knew it at all) is that not all countries operate their external trade in the same way that Australia does. That is particularly so in the case of the developing economies of south east Asia.

- G.5 In relation to the goods imported from Taiwan, no evidence at all was presented in relation to the fundamental question of the price actually paid for the goods. One document provided to Mr Tomson under the discovery order, but not tendered in evidence by the prosecution, was a minute written by Mr J Delmenico, Senior Australian Customs Representative at the Australian Embassy in Tokyo. (Mr Delmenico had assisted Mr Grausam in the interviewing of potential overseas witnesses in December 1989). That minute (Annexure 8) contains the statement -

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

The minute was dated 27 June 1988. Despite the clear warning given by this document that apparel is sold in Taiwan at certain times of the year by weight rather than price per garment, the ACS persisted with its prosecution of Mr Tomson in the face of a complete lack of evidence of wrongdoing on his part.

- G.6 The final observation to make in respect of the assessment document is that the Senior Inspector Valuation (“SIV”) of the ACS in Sydney purported on 4 September 1992 to “revoke” the customs values contained in the entries relating to the seized goods. His minute relating to this matter states that the “revocation” was made pursuant to the power conferred by sec. 161D (1) of the Customs Act. It should be noted that sec. 161D only confers the power to revoke a determination of value made by an officer on an earlier occasion. No determination of customs values relevant for the purposes of sec. 161D had ever been made in relation to the seized goods, despite numerous attempts by Mr Tomson’s accountants and legal advisers to have such determinations made. Furthermore, sec. 161C requires that, where a determination of value is

made for the purposes of the valuation provisions of the Customs Act, the owner is to be advised. No such advice was ever sent to Mr Tomson or to the directors of Vamani or Lanwren. The SIV's purported reliance on sec. 161D to "revoke" the customs values on the entries for the seized goods is clearly unlawful and an abuse of the purpose for which sec. 161D was enacted.

H. EARLIER PROSECUTION AND INVESTIGATION OF MR TOMSON

H.1 As noted above, Mr Tomson migrated to Australia in 1980. In 1984 he decided to start up an apparel importing business. On 11 August 1984, he arrived at Sydney International Airport with a quantity of apparel in his personal luggage. The goods in his possession were 99 ladies' two piece suits, 100 ladies' blouses, 8 ladies' dresses, 6 ladies' skirts, 41 mens' shirts and 4 pairs of ladies trousers. Mr Tomson had purchased the goods to be the initial trading stock for his new business venture. He filled in the Australian Customs arriving passenger declaration. In response to the question on the declaration form "Do you have in your possession goods for commercial purposes?", Mr Tomson ticked the box on the form that said "No". Mr Tomson has told me that he thought the question was asking if he was importing goods on behalf of an established business. He knew that he wasn't (at that point anyway), but he was not sure what the question actually meant, so when he arrived at the customs barrier, he pointed out his answer to the officer and asked what it meant. Mr Tomson has told me that the officer responded with words to the effect of "They'll tell you over there" and directed him to the duty channel. Mr Tomson's bags were searched and the abovementioned goods were seized. He was charged with two offences, viz, smuggling and the production to an officer of a statement untrue in a particular. He was convicted of both offences in the St James Centre Local Court on 23 October 1985.

H.2 I have known Mr Tomson for about 15 years now. It is fair to say that his command of the English language today is rudimentary. In 1984 it would have been almost non-existent. I can well understand that he would have had difficulty in making himself understood at the customs barrier in August 1984. If the details of the incident as related to me by Mr Tomson are correct (and I have no reason to believe otherwise), I consider it unlikely that Mr Tomson would have been convicted if the offence had been committed in the year 2003, for the simple reason that

the decision of the High Court of Australia in *Murphy v Farmer* (1988) 165 CLR 19 would make it very difficult for the prosecution to establish the element of mens rea on those facts.

- H.3 Unfortunately, that incident was the beginning of many years of difficulties for Mr Tomson in his dealings with the ACS. On 28 November 1984, Mr Tomson again had a quantity of apparel seized from his luggage at Sydney International Airport. He was charged with smuggling and the production to an officer of a statement untrue in a particular. The matters were heard at the St James Centre Local Court on 19 November 1985. Both charges were dismissed.
- H.4 Thereafter, Mr Tomson's importing activities through the post were subjected to a lengthy investigation to determine if any offences were being committed. No goods were ever seized or detained. That investigation was followed by the investigation into his importing activities that ultimately led to the detentions and seizures of goods that took place in 1987 and 1988. The documentary history of those matters is too extensive to be reproduced in this statement. However, a detailed indexed summary of documents obtained under the discovery order made during the trial of Mr Tomson is being prepared and will be made available for examination when completed.

I. OTHER MATTERS

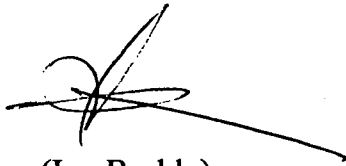
There are numerous other matters arising from the treatment of Mr Tomson at the hands of the ACS which can be the subject of a further statement. Those matters include the following -

- (a) whether the issue of sec. 38B notices by the ACS, in relation to each shipment of seized goods, was undertaken principally for the improper purpose of enabling the Collector to avoid making a decision on the customs value of the goods. The question also arises as to whether the issue of these notices was intentionally oppressive and amounted to an abuse of power
- (b) the refusal by the ACS to determine a customs value at any level it considered appropriate, with the consequence that Mr Tomson was denied the opportunity to bring proceedings in the Administrative Appeals Tribunal to have the customs value determined in accordance with the rights conferred on importers

by sec. 167 of the *Customs Act* 1901

- (c) the unconscionable delay which occurred between the date of seizure of the goods and the date of the offer to return the goods on security
- (d) the swearing of an affidavit containing false information and the question of whether the evidence given by Mr Grausam in the Federal Court proceedings in 1988 amounted to perjury
- (e) the giving to the Federal Court in 1988 of a false undertaking in respect of completion of the ACS investigation
- (f) the reasons for the decision of Mr Johnson, briefed by the Australian Government Solicitor in relation to the proceedings in the Local Court, to return the brief when the matter was only part heard
- (g) whether the prosecution of Messrs Tomson and Keomalavong took place contrary to the advice of the Director of Public Prosecutions
- (h) the reasons for the decision to prosecute Messrs Tomson and Keomalavong in spite of the complete lack of any positive evidence of wrongdoing on their part
- (i) the reasons for the delay of two and a half years between the obtaining of evidence from overseas customs administrations regarding the subject import transactions and the issue of summonses
- (j) whether the decision to prosecute Messrs Tomson and Keomalavong was taken by the ACS alone and whether that prosecution was undertaken for improper reasons having nothing to do with the merits of the case which could be made against the defendants
- (k) whether the decision to fabricate evidence against the defendants was made by more than one person and whether that decision amounted to a conspiracy to pervert the course of justice
- (l) the results of an audit of Mr Tomson's business affairs,

undertaken by the Australian Tax Office ("ATO") at the suggestion of the ACS in 1988. Mr Tomson has advised me that the ATO was satisfied that he had correctly determined his profit & loss situation and his tax liability in the period covered by the review. The significance of this fact is that, if Mr Tomson was actually making two payments for imported goods in accordance with the ACS theory, he would have overstated the net operating profit before tax of his business by a significant degree and been paying income tax for which he would otherwise have not been liable.

A handwritten signature in black ink, appearing to be 'I R Rodda', with a long horizontal stroke extending to the right.

(Ian Rodda)

Sworn at Sydney on 24 April 2003

LIST OF ANNEXURES

1. Affidavit of Paul Vilaysack dated 27 June 1988
2. Affidavit of Kongkeo Keomalavong dated 24 June 1988
3. Affidavit of Somphet Vilaysack dated 24 June 1988
4. Extract from transcript of evidence *Australian Customs Service -v- Thongson Imports and Exports & Ors* 1993 (unreported)
5. Extract from *Customs Act* 1901 of provisions relating to determination of customs value of imported goods. (The extract reproduces the valuation provisions of the Act that were relevant at the date of seizure of the goods). It also reproduces sec. 38B and the provisions relating to seizure of goods and the giving of notice
6. Study on the valuation of apparel by the Customs Cooperation Council
7. Statement of Gregory Steffan Grausam relating to interviews with the overseas suppliers of goods and providers of services to Peter Tomson
8. Minute dated 27 June 1988 from Senior Australian Customs Representative, Tokyo
9. Minute dated 4 September 1992 by Senior Inspector Valuation and assessment of customs values by Gregory Steffan Grausam
10. Comparison of invoiced quantities of goods purchased from Cameron Trading and information contained in applications for export licences in Hong Kong
11. Brief to Counsel dated 23 July 1993
12. Informations initiating the proceedings against Peter Tomson and Kongkeo Keomalavong
13. Amended Informations
14. Comparison of issues arising in the Midford and Tomson cases