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OUR REF:

22 March 2004

The Hon Bronwyn Bishop MP
Federal Member for Mackellar
657 Pittwater Road
DEE WHY NSW 2099

Attachments to this submission available on request

Dear Bronwyn,

Averments Inquiry

As agreed during our meeting on Wednesday 17 March 2004, I have set out below my response to a number of issues raised by the ACS in its written and oral submissions at the hearing conducted on 24 July 2003.

Apart from the first two matters summarised, the matters referred to below are not directly relevant to the terms of reference for this Inquiry. However, since these issues are now a matter of public record, by virtue of having been raised by the ACS, I feel compelled to respond out of concern that failure to do so might be interpreted as acquiescence.

The "Fundamental Points" Issue

In its submission dated 21 July 2003, the ACS made what it referred to on page 4 as "two fundamental points" in rebutting key allegations contained in my detailed statement dated 24 April 2003. The first of these "fundamental points" sought to rebut my allegation that the prosecution of Mr Tomson could not have proceeded unless the averment power had been available to the prosecution. The ACS claimed in its submission that "the averments did not play any major role in the prosecutions" (page 8). I have responded comprehensively to that point, and demonstrated its falsity, in my submission dated 4 March 2004.

The second "fundamental point" relates to two statements I made at the hearing on 23 June 2003. The first statement was my claim that the prosecution of Peter Tomson did ***not*** proceed on the basis that the prices shown in the import documents produced to the ACS were not genuine. The second statement was my claim that the manner in which the prosecution outlined its case, in its opening address, amounted to an attempt to mislead the court into accepting that the legal

obligation imposed on an owner of goods is to provide to the ACS something other than evidence of the actual price paid for the goods.

The ACS refutes these assertions (pages 8 to 10). Its submission claims that it did dispute [the genuineness of] the prices shown in the import documents, and goes on to assert that there is "ample evidence" to demonstrate that my claims "are simply not accurate" (page 8). It then describes that evidence as the key averments and the documents referred to in those averments (despite the earlier contradictory submission that the averments had no major role to play in the prosecutions).

The ACS submission then seeks to persuade the Committee that my claim "that an owner ... cannot commit an offence if he correctly declares ... the amount which was actually paid or payable for the goods" is without substance. The ACS asserts (correctly) that this issue was one of the submissions put forward by the defence when it sought dismissal of the charges in the Cameron Trading Co matter on the basis that the prosecution had not established that there was a case to answer. The ACS submission then goes on to claim (wrongly) that the magistrate recognised that the submission [of no case to answer] involved a *non sequitur* and did not respond to the case presented by the prosecution. It quotes a passage from the magistrate's ruling in what appears to be an effort to support its claim -

> "... It may well be the case it is not an offence to undervalue goods however the prosecution allege that false entries were made on the invoices and entries for home consumption by the insertion on those documents of lower prices per unit of clothing and lower total prices for each type or style of clothing than the prices which were actually paid for the goods in the country of export ...".

The ACS submission then goes on to state that the above passage from the transcript "shows that the prosecuting counsel did not mislead the court in the manner alleged. The case was always put on the basis that the prices shown in the invoices and entries were not the true prices paid ... The prosecution case was that the prices shown in the entries and the invoices were less than the prices actually paid and that this was done with the intent of evading duty and defrauding the revenue".

The submission is entirely disingenuous. I make the following observations in response to it. Firstly, there is no *non sequitur*. The magistrate's ruling plainly refers only to the prosecution's **allegations** against the accused. These were set out in the averments. Apart from the averments, there was no other evidence before the court to support the allegations. (Mr Prelea's evidence was not concerned with

this point). The allegations (and averments) were themselves false, and nothing was placed before the court to suggest otherwise.

Despite the fact that I have raised this issue now in several different contexts, the ACS has consistently failed to respond to my direct and unambiguous assertion that key averments utilised in the Tomson trial were false.

Secondly, the ACS in this submission omits to mention that, apart from evidence led early in the trial to identify certain documents (entries and invoices) as being those presented to the ACS at the time of importation of the goods, the prosecution at no time during the trial put these documents or any of the overseas documents to witnesses who could give evidence to support what was averred in relation to their claimed falsity, etc.

The attempt by the ACS to suggest otherwise in its submissions to this Committee is deceitful and misleading.

I turn now to the remainder of the matters raised in the ACS submission dated 21 July 2003.

The "Four Principal Allegations" Issue

My detailed statement of 24 April 2003 raises several allegations concerning the conduct of the ACS investigation into Mr Tomson's importing activities. At the 23 June 2003 hearing, the Deputy Chair, Mr Murphy, sought further details in relation to four of those allegations. The ACS provided its own response to each, as indicated below.

(a) Allegation 1

This was my allegation that the ACS officers who conducted the investigation failed to investigate matters in an impartial and objective manner. The ACS claims that this allegation is intended to persuade the Committee that Mr Tomson's activities did not merit attention from the ACS.

That claim is wrong. The purpose of the allegation is to draw attention to the fact that the examination of Mr Tomson's importing activities proceeded at all times on the basis that the ACS believed it was investigating a major fraud. At no time did anyone in the ACS pause to consider the question of whether the goods imported by Mr Tomson may simply have been purchased at dumped prices (which is in fact what happened). A proper, objective consideration of that question would

have eventually resulted in the investigation being terminated without seizure of the goods and without any charges being laid.

Consider for example the file note made by Mr Grausam on 29 August 1989 in relation to the Thai transactions (Attachment A). He notes "*Although the documents sourced show various discrepancies I consider that they are not very useful as evidence as there is no pattern on which to base a strong allegation of fraud ... The lack of more current Thai export documents and the exchange control forms means that we will now be unable to show that the various entities had prepaid certain monies as well as paid other amounts for the same shipments at a later date (i.e. double payments)*". Mr Grausam had already visited Thailand (in February 1989) at the time he wrote this note. He visited Thailand again in December 1989 to interview the various persons involved in the exporting of apparel to Australia on Mr Tomson's behalf.

There is nothing in the material available to me to indicate that Mr Grausam and the ACS were in any better position to prosecute Mr Tomson after the December 1989 trip to Thailand by Mr Grausam than they were before that trip. In fact, the reverse applies. Mr Tomson's purchasing practices, and the procedures adopted by the other parties to the transactions to comply with the export laws of Thailand, were made abundantly clear to Mr Grausam during the interviews. No evidence of "double payments" existed, despite the false and misleading comment to that effect in the 29 August 1989 note. The only reasonable conclusion open to Mr Grausam following the December 1989 visit to Thailand was that no evidence existed of any wrongdoing on Mr Tomson's part.

To further illustrate this lack of objectivity, consider the evidence of the witness called by the ACS during Mr Tomson's trial (Mr Prelea). He was asked during cross-examination (transcript 18 April 1994, page 20 - Attachment B) if he was aware that there had been a slump in the garment manufacturing industry in Taiwan in 1987 and 1988. He replied that there had been, and that it also affected Hong Kong and Thailand.

The significance of this fact would not have been lost on any ACS officer trained in dumping investigation. If the matter of the slump could be raised by defence counsel during Mr Tomson's trial, then it could also have been raised with Mr Prelea in 1987 or 1988 when he visited the ACS to give his opinion on the cost of manufacturing the various items imported. There is nothing in the material available to me to suggest that that issue was ever raised. It should have been. If it was not raised, why was it not raised?

The ACS was also aware from the time it commenced its investigation that Mr Tomson purchased small quantities of individual apparel and other fashion items from street markets and the like. Why was the significance of that fact ignored? Why was the Customs Co-operation Council study on the sale of apparel at prices lower than the cost of production apparently also ignored?

Consider in addition the evidence of Mr Balzary, a former Director in the ACS and, at the date of his retirement in Canberra in 1989, one of the most experienced overseas investigation officers in the ACS. Why was the opinion of experienced officers like Mr Balzary not sought in relation to this case? I had also attempted on several occasions throughout 1988 to raise the likely dumping issue with Investigation Branch officers and was ignored.

On pages 10 to 13 of its 21 July 2003 submission, the ACS makes a number of self-serving claims that its investigation of Mr Tomson was justified on objective grounds, and lists those grounds.

The first of these (on page 10) is the assertion that "Mr Tomson had a history of non-compliance under the *Customs Act* 1901 and the *Commerce (Trade Descriptions) Act* 1905". What the ACS is referring to, firstly (in relation to the Customs Act), is Mr Tomson's inability to provide responses to some of the questions he was asked under sec. 38B notices. These questions included such things as demands that he produce manufacturers' catalogues for the goods he imported, despite the fact that the ACS knew that he purchased his goods from community markets and street stalls, and that no such catalogues existed. Mr Tomson provided to the ACS everything he was able to produce in response to the sec. 38B notices, but some things simply did not exist. His inability to provide things that did not exist is now put forward as a justification for the ACS view that Mr Tomson "had a history of non-compliance".

The reference to the Commerce (Trade Descriptions) Act also requires explanation. Apparel imported without labels showing country of manufacture could, in certain circumstances, be declared a prohibited import. However, it was recognised by the ACS that the absence of a label on imported goods at the time of importation was frequently a problem over which the importer might have no control. It was the ACS practice at the time therefore to allow persons who had imported unlabelled apparel to attach labels whilst the goods were under customs control, and to then release the goods. Mr Tomson, like many other importers, had around this time imported apparel incorrectly labelled or without labels. He had been permitted to attach complying labels. The ACS has presented this issue to the Committee however as though it was a significant consideration in the decision to detain all of his imports from mid-1987 onwards. Both of the above claims by the

ACS regarding a "history of non-compliance" can be dismissed as nothing more than self-serving hyperbole.

According to the ACS chronology, Mr Tomson's problems with the ACS commenced with his August 1984 conviction in relation to a quantity of apparel found in his luggage. The ACS and I have expressed differing views in relation to the appropriateness of that conviction. This was followed in December 1984 with further charges in relation to the importation of another quantity of apparel in his luggage. Those charges were dismissed.

The ACS history then goes on to describe the examination in June and July 1987 of further apparel imports suspected of being "undervalued", and the subsequent events which led to Mr Tomson being charged.

The ACS omitted to mention however that throughout the period from December 1983 to mid-April 1984, Mr Tomson had also been the subject of a fraud investigation relating to his imports through the post. He was cleared of any wrongdoing. A copy of the ACS file is attached. See Attachment C.

I was particularly interested in the comment in paragraph 4.1.2 of the minute dated 4 April 1984 in Attachment C which claimed that Mr Tomson (under his former name Vilaysak) had been studying English at Liverpool Technical College "and speaks this language quite fluently". I have known Peter Tomson for more than 16 years now and I still have difficulty understanding him. In 1984 I seriously doubt that any Australian of Anglo-Celtic origin would have been able to understand him. This claim by the ACS though is a further example of the practice it has engaged in for many years of making self-serving claims without any regard for the truth.

It would appear from the ACS records that, up until the time his trial commenced, Mr Tomson had in fact been under regular surveillance by the ACS since late 1983.

The ACS chronology refers to Mr Tomson's lack of co-operation with the ACS investigation officers as a reason for its view that he was engaged in unlawful conduct. I suggest a more compelling explanation for Mr Tomson's apparent lack of co-operation was his knowledge that he had done nothing wrong and, despite that, all of his efforts throughout 1987 to assist the ACS to determine the customs value of his goods were rejected or ignored. The ACS does not appear to have given any consideration to this as a likely explanation for Mr Tomson's apparent lack of co-operation. He believed, with considerable justification, that he was being unjustly persecuted.

The ACS also claims that another reason for its suspicion that Mr Tomson was engaged in a major fraud was that he had sent over $1.0 million out of Australia between 1985 and 1987, and had only imported goods having a FOB value of $109,000. The ACS refers to this fact in its submission as a "discrepancy".

As a basis for suspicion that Mr Tomson was engaged in wrongdoing, the claim is breathtaking in its arrogance and stupidity. To begin with, why should the ACS have assumed that all of the money sent overseas was used to purchase goods imported into Australia? Further, as even the most junior ACS officer is aware, the price paid for imported goods consists of far more than the mere FOB purchase price represented by the $109,000. The average of the airfreight costs incurred by Mr Tomson was equal to over 80% of the FOB value of the imports (actually valued at about $144,000). The freight costs incurred would have therefore been between $115,000 and $120,000 - a fact ignored by the ACS in its calculation of the amount claimed to be a "discrepancy".

As I pointed out in my 4 March 2004 submission, the sum actually sent overseas by Mr Tomson was about $915,000. An amount of over $81,000 in the ACS calculation was made up of overseas remittances that had been double counted by Mr Grausam. Mr Tomson can account for just about all of the money he sent overseas between 1985 and 1987. A considerable proportion of it was invested. I understand Mr Tomson is making a further submission through his solicitors in relation to his financial affairs, and that submission will indicate that his overseas investments actually provided most of his income and paid his ongoing business expenses up until mid-1990.

I note also the claim made by the ACS on page 13 of its submission that Mr Prelea had been informed that the companies that invoiced Mr Tomson's purchases in Thailand were "not registered with local authorities as manufacturers or suppliers". That information is contrary to my own findings from my visit to Thailand in 1998. There is nothing in the ACS files either to indicate that Mr Grausam had found that to be the case following his visit to Thailand in December 1989.

The ACS on page 14 of its submission states that its enforcement action is subject to checks and balances, and that it sought appropriate legal advice from both the DPP and AGS before deciding to proceed with charges against Mr Tomson. It is my experience that legal officers in the Offices of the DPP and AGS have a knowledge of customs practice and procedure that would be regarded as rudimentary at best. I am aware also that, within the office of the AGS in particular, legal officers rely heavily on the advice of the customs officers who provide instructions, and can be misled without even being aware of it.

(b) Allegation 2

The second of my allegations referred to by Mr Murphy is the allegation that Customs ignored evidence that Mr Tomson was innocent, including the evidence set out in Mr Grausam's statement relating to his overseas inquiries. The ACS states that I was not at the time able to identify any part of Mr Grausam's statement to support my allegation.

I responded to that issue in my submission dated 1 March 2004.

The ACS then makes an observation in respect of the Delmenico minute dated 27 June 1988. The minute stated that apparel could be purchased at certain times of the year by the kilo, suggesting it is available at very low prices. The ACS claims in response that the minute is not relevant in the Tomson case and that the invoices lodged with the ACS refer to the goods by number and not by weight.

The ACS response is disingenuous nonsense. Mr Tomson often purchased apparel by the kilo. However, formal customs entry procedures (both for export from the country of purchase and for importation into Australia) required the goods to be invoiced by description, number of units, unit price and total price. Where such information is not available in relation to the purchase itself (for example, in circumstances in which the goods may have been purchased by the kilo), the usual practice is for the person preparing the invoice to arbitrarily allocate the total purchase price across the range of goods covered by the invoice. It is also my experience that this is a normal commercial practice.

The ACS also seeks to justify the fact that it ignored the Customs Co-operation Council (CCC) study on disposal of surplus goods by claiming that Mr Prelea had advised that it was not possible to buy apparel in South East Asia at the prices paid by Mr Tomson. I make two observations in response. Firstly, Mr Prelea's advice was wrong, as the defence proved during Mr Tomson's trial. Secondly, Australia was a member of the (then) CCC and was expected to have regard to material published by the Council for the guidance of member states in circumstances such as the very situation in which Mr Tomson found himself.

The ACS also points to the fact that the magistrate found that a *prima facie* case had been established in relation to each of the charges against Mr Tomson. It cites this fact as evidence of the integrity of the investigation. I have commented elsewhere on the validity of the court's finding on the *prima facie* case issue. The ACS submission on this point is therefore a very dangerous hyperbole that should perhaps have been avoided.

(c) Allegation 3

That an officer swore a false information to obtain a search warrant.

There were in fact two false informations sworn to obtain search warrants. The first is the one referred to by the ACS on page 17 of its submission. The defence put forward by the ACS is not supported by the evidence from its own file. Further, the self-serving justification that the ACS is entitled to rely on inaccurate or misleading information, vague suspicion and innuendo as a basis for issuing search warrants deserves the closest scrutiny.

The second false information is the one sworn by Mr Grausam on 24 June 1988 to obtain the search warrant in relation to the Cameron Trading Co shipment. See Attachment D. The information states that the entry lodged in respect of the shipment was false. That statement is itself false. The detailed analysis of this transaction in my 24 July 2003 submission shows that the quantity and description of goods shown in the Hong Kong export licence applications and export permits differs from the quantity and description of goods shown in the invoice and packing list for the goods that were actually shipped to Australia. The contents of the packages for this shipment had been confirmed by physical examination by an ACS officer on 27 April 1988. The information was sworn two months later on 24 June 1988. There was therefore no legitimate basis upon which Mr Grausam could have formed the view that the sum of HK$126,620 was the amount paid for the goods that were actually imported, because the goods to which the amount of HK$126,620 referred were not in fact those goods.

It is simply beyond belief that the officer swearing the information was not aware of that fact.

(d) Allegation 4

The last of the four allegations referred to is that Customs deliberately destroyed Mr Tomson's business. This is a conclusion based on my detailed examination of all of the material available to me. I stand by it.

The ACS makes a number of submissions in relation to this allegation to which I will respond only briefly.

The first is the assertion that the ACS decision to prosecute Mr Tomson rather than to re-evaluate his goods was vindicated by the finding of the magistrate that a *prima facie* case had been established. I have commented elsewhere that the ACS

has consistently sought to make a virtue out of the fact that it succeeded in that enterprise only through the swearing of false averments.

Next, the ACS claims that Mr Tomson abandoned one of his remedies, i.e., the right to obtain release of the goods on security. The submission further claims that the "security to which Customs agreed was to be a bank guarantee to cover their market value" and further in the same paragraph "the security did not require the payment of $240,000. It only required the payment of a bank fee for providing the guarantee". Attachment E is a copy of the letter dated 14 June 1989 sent by the ACS in respect of the Cameron Trading Co shipment. (Letters in the same terms were also sent in relation to the other seized goods). As the document itself plainly shows, there is no reference anywhere to an offer to release the goods on the security of a bank guarantee.

Mr Tomson commenced proceedings in the Federal Court in June 1988 to obtain reasons for the decisions to seize his goods. The proceedings were abandoned part heard. The ACS in its 21 July 2003 submission puts forward the speculative assertion that Mr Tomson abandoned these proceedings "based on advice given to him by his counsel after he had the opportunity of reading confidential material prepared on behalf of Customs". I gave evidence at the 23 June 2003 hearing that Mr Tomson's counsel declined to read the affidavit filed by the ACS, and advised Mr Tomson to withdraw because of the manifest unfairness of the course proposed.

The ACS has challenged my evidence in relation to this matter, stating on page 20 that "[t]he evidence of Mr Rodda that the discontinuance only came about because Mr Tomson's counsel declined to read the affidavit filed by the respondents (Customs) is difficult to believe".

Attachment F is a letter to me dated 14 October 2003 from Michael Cashion SC who appeared for Mr Tomson on the day in question in June 1988. Mr Cashion states in paragraph 2 of his letter, in relation to the matter of the affidavit and the basis upon which it was provided to him -

> " I do recall ... that the express basis was that I did not show it or discuss its contents with either my instructing solicitor or my client. I am certain that I did not read that material. I did not read it because I formed the view that if I did so when I could not discuss its contents with my instructing solicitor and client and could not obtain their instructions, I was likely to place myself in a position which was professionally untenable. It was for the same reason that I did not remain [in] Court when it was closed to enable the affidavit material to be received into evidence. It is my recollection that

I informed the Court as to why I was leaving the Court whilst it remained closed".

This letter answers the ACS assertion. Because the letter is a personal note to me also dealing with other matters, I request that the letter itself be treated as confidential.

One of the numerous allegations I have made against the ACS is that two of Mr Tomson's shipments were detained but not seized and never returned. The ACS has asserted on page 21 of its submission that the two shipments in question (one for Vamani Pty Ltd and the other for Lanwren Pty Ltd) were seized and that a notice in each case was served on the owner.

I repeat my assertion that the goods were not seized or, if they were, no notice of that fact was ever served on the owners of the goods. I note in this regard also that, when the ACS produced the Lanwren file in the Local Court in response to the discovery order, there was only one copy of a seizure notice on the file, and that was the notice relating to the Cameron Trading Co shipment.

Despite the assertion now advanced by the ACS that the goods in these two shipments were lawfully seized, I have not seen at any time during the past 16 years any evidence to support such a claim.

To this day also, no explanation has been provided as to why no charges were ever laid in respect of the goods in these two shipments.

The ACS offered some gratuitous advice on other legal remedies that Mr Tomson might have pursued in an effort to recover his goods. In response to those submissions, I can only say that the arrogance of the ACS is almost beyond belief. Unlike the ACS, Mr Tomson does not have the unlimited resources of the Commonwealth at his disposal to fund litigation. He sought advice from highly regarded counsel and acted on the best advice available to him. Besides, there is not the slightest doubt in my mind that any effort by Mr Tomson to obtain some legal remedy other than those actually pursued would have met the same "brick wall" response received in the Federal Court - ACS evidence filed in affidavit form and immunity from disclosure sought on public interest grounds.

The ACS suggested on page 22 of its submission that the reason Mr Tomson has not commenced proceedings against the ACS for damages "is that there is no basis for them". The truth of the matter is that Mr Tomson has been destitute for some years and is in no position to fund litigation of the kind contemplated, an issue which has no bearing at all on the merits of any potential claim..

The ACS also advances the spurious argument that Mr Tomson's financial position could not have been damaged by the seizure of goods worth $13,000 when his annual turnover was around $1.0 million. The depth of ignorance of commercial practice underlying this submission is staggering. For a start, the figure of $13,000 is merely the declared FOB value of the goods imported by Thongson Imports & Exports. This figure does not represent the total cost of the goods, to which must be added freight, customs duty (including quota duty), clearance and delivery charges and the wholesale margin to recover the operating costs of his businesses. Further, the goods represented by the figure of $13,000 were not the only goods imported by and seized from businesses in which Mr Tomson had an interest. As the ACS itself determined, the goods seized from Mr Tomson's businesses were worth over $230,000 at the retail level at which turnover is calculated. The two illegally seized shipments are not included in this figure. The seized goods in fact represented over 25% of his annual trading stock throughout late-1987 and early-1988.

The point apparently also needs to be made in response to the ACS submission that turnover does not equal profit, and that most of the profits made by Mr Tomson in Australia were channelled back into his businesses.

It should be noted also that Mr Tomson funded his overseas retail businesses and his timber mill from the profits of his Australian operations. The glut of apparel stocks in South East Asia in 1987 and 1988, and the generally depressed level of prices for such goods, both at the manufacturing and retail levels in the region, made it difficult for retailers to operate profitably. Without stock purchases for his Bangkok outlets being funded from profits made in Australia, Mr Tomson's overseas businesses faltered once funding was curtailed.

The damage to his business interests from seizure of his goods in Australia therefore had a snowball effect on all of his business interests. It is important to note also that Mr Tomson was required to continue meeting the costs of maintaining his business operations throughout the period that he was starved of trading stock, and the resultant drain on his financial reserves rapidly depleted his assets.

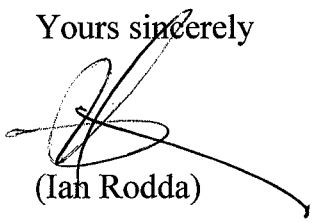
The ACS makes the point on page 24 of its submission that "Mr Rodda also confuses the question of dumping when he suggests that Customs should have charged Mr Tomson with dumping if it thought he was importing goods below the cost of production". Importers are not "charged" with dumping. It is not an offence to purchase goods at dumped prices, nor is it an offence to import such goods into Australia.

For the record, I have specialised in the field of customs practice and procedure for almost 40 years now, and have considerable experience in the dumping field both in Australia and overseas. I worked in both the Dumping and Valuation Branches of the ACS at a senior level for several years. I was trained as an overseas investigation officer in an internal six-month ACS training course. I have lectured extensively on dumping and valuation practice and procedure. I have worked on several major dumping cases as a private consultant and have appeared in the Federal Court as an expert witness on dumping.

I am personally outraged and insulted by the implied suggestion that I have little or no knowledge of such matters, or that I am "confused". I suggest that the above comment reveals more about the ignorance of the person making it than it does in relation to any perceived lack of knowledge of dumping practice and procedure on my part.

Finally, I would like to thank both you and the Committee for the invitation to participate in this inquiry, and trust that you will find my various submissions of assistance in considering your response to the terms of reference.

Yours sincerely



(Ian Rodda)