

Appendix E - Correspondence from the Director of Public Prosecutions



DPP

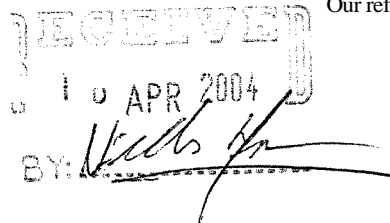
Commonwealth Director of Public Prosecutions

Damian Bugg QC

Your reference:

Our reference:

15 April 2004



Inquiry Secretary
Dr Nicholas Home
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Suite R1 109
Parliament House
CANBERRA ACT 2600

Dear Secretary,

Comptroller-General of Customs v Tomson (aka Paul Vilaysack) and Ors

I refer to the letter dated 1 April 2004 from the Chairman of the House of Representatives Standing Committee on Legal and Constitutional Affairs ("the Committee") and the Committee's inquiry regarding the abovementioned matter.

The Committee has received evidence in relation to this matter which stated that:

"11/12/1990 DPP legal advice located at folios 245-258 of file N88/07987 Part 2, advises insufficient evidence to proceed under 29D or 86A of the Crimes Act 1914. Suggest that Prosecution Brief be referred to AGS for prosecution under Customs Act 1901, whereby the averment provisions can be advantaged".

The Committee has asked for our comment on this advice.

I wish to advise that on 11 December 1990 this office provided written advice to the Australian Customs Service ("ACS") in relation to Mr Paul Vilaysack and others. The ACS had forwarded a brief of evidence to this office and sought our advice as to whether the evidence contained in that brief disclosed the commission of any offences under the Crimes Act, 1914 ("Crimes Act") by Mr Vilaysack or any of the other persons.

The broad allegation was that there had been an evasion of customs duty with respect to the importation of certain goods from Thailand, Hong Kong and Taiwan. The DPP examined the brief in terms of section 29D (defraud the Commonwealth) and section 86A (conspiracy to defraud the Commonwealth) of the Crimes Act.

The evidence in this case was closely examined and it was noted that much of this evidence was inadmissible in its present form. The ACS was advised that there was **insufficient** evidence to establish a **prima facie** case against Mr Vilaysack or any of the other persons for offences against section 29D or section 86A.

Reference was made to the guidelines between the ACS, AGS and the DPP in relation to the referral of matters to the DPP for the taking of action under the Crimes Act or the referral to AGS for proceedings under the Customs Act. In particular paragraph 10 of those guidelines provided "(I)f a matter is referred to the DPP which appears, in accordance with the guidelines, to be more appropriate for pecuniary penalty **action**, or if the available evidence (whether presently obtained or able to be obtained) is insufficient to establish offences to the criminal standard of proof, the DPP will report to the AGS and refer the matter to it as soon as possible".

In advising the ACS that there was insufficient evidence to proceed against Mr Vilaysack or any of the others under the Crimes Act, the DPP stated that there may be sufficient evidence to warrant commencement of proceedings for offences under the Customs Act, e.g. section 234, and it may be that this matter should be referred to the AGS for consideration to be given to the commencement of proceedings under the Customs Act. The advice stated that as Customs Act proceedings are handled by the AGS, we were not advising on the sufficiency of evidence in relation to any possible Customs Act prosecution.

The advice noted that in proceedings pursuant to the Customs Act the prosecution can take advantage of the averment provisions in section 255 of the Customs Act and so be able to establish to a prima facie level certain facts otherwise difficult to formally prove. The advice did not refer to any such facts in this regard and did not discuss averments **further**. The advice also referred to the fact that Customs Act offences were traditionally perceived as civil or at least quasi criminal in nature and hence handled by the AGS.

Thank you for inviting us to comment on our advice. Please let me know if we can assist you any further.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Damian Bugg', with a stylized flourish at the end.

DAMIAN BUGG QC
Director