
The Parliament of the Commonwealth of Australia

Modern-day usage of averments in customs prosecutions

House of Representatives
Standing Committee on Legal and Constitutional Affairs

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Foreword

When a government conducts a prosecution against a person, the operation of the law in determining the status of the evidence in the case is vital to the integrity and fairness of the proceedings. It is also important to the integrity of the judicial system as a whole. In the context of Customs prosecutions, the averment provisions in the *Customs Act 1901* are part of this crucial operation of the law.

Averment provisions have been a feature of the *Customs Act 1901* since its inception and although they do not reverse the onus of proof they allow statements of fact made by the prosecution to be taken as evidence of those facts unless the defendant produces evidence to the contrary. Averments are said to be necessary due to inherent problems in the gathering of evidence for Customs prosecutions.

The House of Representatives Standing Committee on Legal and Constitutional Affairs is pleased to have undertaken this inquiry. While averments are a technical legal mechanism in Customs prosecutions, they take place in the midst of the court process and are relevant to fundamental issues such as procedural fairness and equity between the parties. The Committee has considered these and other issues in this report and has made a number of recommendations regarding the use of averments. The Committee is hopeful that, in the context of Customs prosecutions, these recommendations will contribute towards improved prosecution practice and the continual refinement of the law as it relates to evidence and court procedure.

In the course of the inquiry the Committee considered the use of averments in a specific Customs prosecution, namely *Comptroller-General of Customs v Tomson and Keomalavong*. The Committee found the Australian Customs Service's handling of this case to be such as to warrant compensation for the defendant Tomson,

particularly in the fact that the investigation and prosecution ran over some 11 years. The Committee accepts that the Australian Customs Service has undergone considerable change since the time the case was conducted; the organisational culture of the Service is not the same today as it was then. However, the *Tomson* prosecution was a product of the same culture which was responsible for the Midford Paramount case, and the Committee believes it should be dealt with on a similar basis.

Hon Bronwyn Bishop MP
Chairman



Membership of the Committee

Chair Hon Bronwyn Bishop MP

Deputy Chair Mr John Murphy MP

Members Hon Julie Bishop MP
(until 07/11/03)

Hon Alexander Somlyay MP
(from 07/11/03)

Hon Alan Cadman MP

Hon Duncan Kerr MP

Mr Daryl Melham MP
(until 11/08/03)

Mr Robert McClelland MP
(from 11/08/03)

Ms Sophie Panopoulos MP

Hon Con Sciacca MP

Mr Patrick Secker MP

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Committee Secretariat

Secretary	Ms Gillian Gould Ms Julia Thoener (acting from 29 March 2004 to 7 May 2004)
Inquiry Secretary	Ms Frances Gant (until July 2003) Dr Nicholas Horne (from September 2003)
Administrative Officer	Ms Frances Wilson



Terms of reference

On 27 March 2003, the House of Representatives Standing Committee on Legal and Constitutional Affairs resolved to conduct an inquiry into averment provisions in Australian Customs legislation. The inquiry followed the Committee's review of the Australian Customs Service *Annual Report 2001-02*.

The inquiry related specifically to the use of averment provisions as contained in the *Customs Act 1901*. The Committee examined cases that have relied on averment provisions in Australian Customs prosecutions.



List of abbreviations

ACS	Australian Customs Service
AGD	Commonwealth Attorney-General's Department
AGS	Australian Government Solicitor
ALRC	Australian Law Reform Commission
CBFCA	Customs Brokers & Forwarders Council of Australia Inc
CITC	Customs and International Transactions Committee, Business Law Section, Law Council of Australia
DPP	Commonwealth Director of Public Prosecutions
JCPA	Joint Committee of Public Accounts
SSCCALA	Senate Standing Committee on Constitutional and Legal Affairs



List of recommendations

2 The Appropriateness of the Averment Provisions

Recommendation 1 (paragraph 2.59)

The Committee recommends that the *Customs Act 1901* be amended so as to provide that, where evidence for a Customs prosecution is obtained, whether outside or inside the Australian jurisdiction, the evidence so obtained should be relied upon by the prosecutor/plaintiff and the averment provisions in the *Customs Act 1901*, except in exceptional circumstances, are not to be used in place of or as a substitute for that evidence.

Recommendation 2 (paragraph 2.66)

The Committee recommends that provisions be inserted into the *Customs Act 1901* establishing a process whereby directions hearings are to be held prior to the commencement of the trial in Customs prosecutions where averments form part of the prosecutor's/plaintiff's case. A number of submissions to the Committee discussed Report 60 of the Australian Law Reform Commission, and the Committee endorses certain components of the proposal in that Report relating to summary trial directions hearings. The provisions establishing the directions hearing process should also, as set out in Report 60, enable the court to make orders on a directions hearing, without limiting the orders that can be made, as to:

1. the just and efficient disposition of the proceeding, including orders for directions for the conduct of the proceeding;
2. the admissibility of evidence; and
3. the determination of a point of law.

The Committee also endorses the components of the proposal in Report 60 relating to disallowable averments, and further recommends that provisions be inserted into section 255 of the *Customs Act 1901* so as to provide, as set out in Report 60, that:

1. if it would be unjust to allow the prosecutor/plaintiff to rely on an averment, the court may, by order, on a directions hearing, disallow the averment;
2. without limiting the matters that the court is to take into account for the purposes of deciding whether or not to disallow an averment, the court is to take into account the following:
 - ⇒ whether the averment is of a matter that is merely formal or is not substantially in dispute;
 - ⇒ whether the prosecutor/plaintiff is in a position to adduce evidence of the matter and if the prosecutor/plaintiff is not in such a position, whether because the evidence is overseas or for some other reason, obtaining the evidence would result in undue cost or delay;
 - ⇒ whether the defendant is reasonably able to obtain information or evidence about the matter; and
 - ⇒ what admissions, if any, the defendant has made in relation to the matter.
3. the prosecutor/plaintiff cannot rely on a disallowed averment.

Recommendation 3 (paragraph 2.71)

The Committee recommends that the Australian Customs Service's practice of referring briefs of evidence assembled towards possible Customs prosecutions to the Australian Government Solicitor for assessment and advice should be maintained.

Recommendation 4 (paragraph 2.73)

The Committee recommends that the Australian Customs Service, in consultation with relevant stakeholders, formulate guidelines for its staff on the appropriate use of the averment provisions in the *Customs Act 1901* in Customs prosecutions. The guidelines should:

1. clearly identify additional powers and improved techniques that are available to Customs officers when securing evidence;
2. state that only suitably trained delegates of the Chief Executive Officer of the Australian Customs Service should make averments;

3. state that the use of averments to establish formal and non-controversial matters or matters usually given judicial notice is appropriate;
4. clearly set out the limitations on the use of averments provided for in subsection 255(4) of the *Customs Act 1901*; and
5. clearly define the limitations on the use of averments identified by judicial authority.

The Committee further recommends that, to the greatest degree possible, the guidelines be inserted into the *Customs Regulations 1926* in accordance with Part XVI of the *Customs Act 1901*.

Recommendation 5 (paragraph 2.87)

The Committee recommends that the *Customs Act 1901* be amended to codify the recent determination of the High Court of Australia in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* that the applicable standard of proof in Customs prosecutions is the criminal standard of proof (beyond reasonable doubt).

3 The Use of the Averment Provisions in *Comptroller-General of Customs v Tomson and Keomalavong*

Recommendation 6 (paragraph 3.83)

Given the reprehensible handling exhibited by the Australian Customs Service over the course of the investigation and failed prosecution of Mr Tomson, the Committee recommends that Mr Tomson receive appropriate compensation for commercial losses directly attributable to the seizure of the goods and to the lapse of time before the resolution of the costs issue between the parties in 1998.

Introduction

Background to the Inquiry

- 1.1 Generally, averment provisions allow statements of fact made by the prosecution to be taken as *prima facie* evidence of the matters stated (or averred). There has been significant debate over averment provisions, both in relation to Customs and Excise matters and criminal proceedings in general. Averments in Customs proceedings are considered to be useful in situations where evidence is located overseas and may be very difficult to obtain and expensive to prove.¹ Averments can also be useful in establishing formal or non-controversial matters, or where matters are solely within the knowledge of the defendant.²
- 1.2 It has been argued, however, that there is considerable potential for overuse and abuse of averment provisions, and that averments go against fundamental principles requiring the Crown to prove every element of its case to the appropriate standard. It has also been argued that, depending on the case, averments may impose an unreasonable burden on the defendant, who may face difficulties and expense in obtaining evidence similar to those facing prosecutors.³

1 Australian Law Reform Commission (ALRC), *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.151.

2 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.151.

3 Customs and International Transactions Committee, Business Law Section, Law Council of Australia (CITC), *Submission 3*, pp.12-13.

- 1.3 A related issue is the nature of Customs prosecutions. There has been considerable uncertainty as to whether Customs prosecutions in the higher courts are civil or criminal in nature. This is significant, as the nature of the prosecution will determine the standard of proof required to establish the prosecutor's case – the civil standard (proof on the balance of probabilities), or the more onerous criminal standard (proof beyond reasonable doubt). A number of submissions to the Committee referred to a pending High Court case, *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors*, as potentially providing guidance on this issue.⁴ As the High Court has recently handed down its decision in this case, the Committee believes that it is appropriate to note the issue in this report.

Effect of Averment Provisions

- 1.4 As noted at paragraph 1.1 above, averment provisions provide that statements of fact made by the prosecution are considered to be *prima facie* evidence of the matters averred. Such statements are taken to be established unless the defendant produces evidence to the contrary. This does not, however, place upon the defendant the legal burden of disproving the matters averred.⁵ The defendant will not have to disprove the matters averred to the relevant standard – for example, in the case of the criminal standard applying, beyond reasonable doubt. Further, it is well established by judicial authority that, in criminal prosecutions, averment provisions do not reverse the persuasive burden that lies upon the prosecution. That is, while an averment may constitute *prima facie* evidence of the fact averred, the onus of proving, beyond a reasonable doubt, that an offence has been committed still rests with the prosecution.⁶ The court must still decide whether or not the prosecution has established guilt.⁷

Averment Provisions in the *Customs Act 1901*

- 1.5 The main averment provision in the *Customs Act 1901* is section 255. Section 255 is as follows:
-

4 CITC, *Submission 3*, p.5; Australian Customs Service (ACS), *Submission 4*, p.9; Commonwealth Attorney-General's Department (AGD), *Submission 5*, p.4.

5 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507; *Charlton v Rogers; Ex parte Charlton* (1985) 20 A Crim R 240; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [142].

6 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507-508; *Charlton v Rogers; Ex parte Charlton* (1985) 20 A Crim R 240.

7 *May v O'Sullivan* (1955) 92 CLR 654; *Ex parte Healy* [1903] 3 SR (NSW) 14.

- (1) In any Customs prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter or matters averred.
- (2) This section shall apply to any matters so averred although:
 - (a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or
 - (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be *prima facie* evidence of the fact only.
- (3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section.
- (4) The foregoing provisions of this section shall not apply to:
 - (a) an averment of the intent of the defendant; or
 - (b) proceedings for an indictable offence or an offence directly punishable by imprisonment.
- (5) This section shall not lessen or affect any onus of proof otherwise falling on the defendant.

1.6 Under section 35A of the Act, averments can also be made by the Collector in proceedings for the recovery of debt relating to the safekeeping of goods on which a Customs duty is payable.⁸ The Australian Customs Service (ACS) indicated that common law principles will apply to the use of averments in such proceedings.⁹

1.7 The ACS noted the basic rationale for these averment provisions:

The principal legislative policy reason for the use of averments in Customs prosecutions is that they assist the enforcement of the objects of the Act, the most important of which is protection of the revenue.¹⁰

8 Under section 8 of the Act, a reference to a Collector is defined as being a reference to the Chief Executive Officer of Customs, the Regional Director for a State or Territory, or any officer doing duty in the matter in relation to which the expression is used.

9 ACS, *Submission 4.3*, p.1.

10 ACS, *Submission 4*, p.5.

Averment Provisions Elsewhere

- 1.8 In addition to the *Customs Act 1901*, a number of other Commonwealth Acts contain averment provisions. Examples include:
- the *Excise Act 1901*;
 - the *Crimes Act 1914*;
 - the *Taxation Administration Act 1953*;
 - the *Commonwealth Electoral Act 1918*;
 - the *Marriage Act 1961*; and
 - the *Income Tax Assessment Act 1936*.¹¹
- 1.9 The *Quarantine Act 1908* contained an averment provision (section 86D) until 1999 when, under the *Quarantine Amendment Act 1999*, it was repealed and replaced by a provision setting out an alternative process for establishing *prima facie* evidence of certain matters.¹² The Explanatory Memorandum for the Quarantine Amendment Bill 1998 indicates the necessity of replacing section 86D with an alternative process: ‘The [new] section is designed to overcome some of the evidential problems that might arise due to the loss of the averment provision in section 86D of the Act.’¹³
- 1.10 Averment provisions, or provisions providing in some way for the establishment of *prima facie* evidence by the prosecution, can also be found in the Customs legislation of other countries. Examples include section 154 of the *Customs and Excise Management Act (1979)* (UK),¹⁴ section 1615 of the United States Customs Legislation,¹⁵ and section 239 of the New Zealand *Customs and Excise Act 1996*.¹⁶

11 AGD, *Submission 5*, Attachment A. For further examples of Commonwealth Acts containing averment provisions, see the Senate Standing Committee on Constitutional and Legal Affairs (SSCCALA), *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, Appendix C.

12 Section 86D of the *Quarantine Act 1908* was repealed by the *Quarantine Amendment Act 1999* and replaced by section 86DA.

13 Explanatory Memorandum to the Quarantine Amendment Bill 1998, p.56.

14 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.151.

15 CITC, *Submission 3*, p.3 and Annexure A. Title 19 of the United States Code contains provisions relating to Customs duties (including section 1615) and can be found at: <http://www.access.gpo.gov/uscode/title19/title19.html>.

16 ACS, *Submission 4*, pp.18-19.

Historical Context

- 1.11 The origin of averment provisions in Commonwealth legislation can be traced to English Customs and Revenue Acts of the nineteenth century.¹⁷ In 1926, Justice Isaacs of the High Court outlined the reasons for the inclusion of averment provisions in the *Immigration Act 1907*:

In most cases, and in late years invariably, special evidentiary provisions have been included without which the main substantive provisions would be of little use. These evidentiary provisions have been found necessary to prevent or counteract the surreptitious or fraudulent evasion of the actual immigration laws by persons who in truth are smuggled into the country and are only discovered, if ever, with difficulty.¹⁸

- 1.12 The ACS cited a passage from an early treatise on Australian Customs law to illustrate the historical rationale behind section 255 of the *Customs Act 1901*:

This is a most important provision, and though not by any means novel in Customs Acts, has been much commented upon as if it were something altogether new and unprecedented. It is a very necessary provision, inasmuch as in many instances whilst there could not be the slightest moral doubt that the offender was guilty, yet it would be next to impossible to actually prove it by direct evidence.¹⁹

- 1.13 The Commonwealth Attorney-General's Department (AGD) outlined the provenance of sections 255 and 35A:

A provision similar to section 255... was included in the original version of the legislation (as section 240), section 35A was introduced in 1953.²⁰

- 1.14 The ACS noted that 'Since enactment, section 255 has been amended only once. This provision has remained unchanged since 1923.'²¹

17 SSCALA, *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, p.65. The AGD notes similarly: AGD, *Submission 5*, p.1.

18 *Williamson v Ah On* (1926) 39 CLR 95 at 103.

19 H.N.P. Wollaston, *Customs Law and Regulations* (Sydney: William Brooks and Co., 1904), p.169. Cited in ACS, *Submission 4*, p.4.

20 AGD, *Submission 5*, p.1.

21 ACS, *Submission 4*, p.4.

Limitations on the Use of Averment Provisions

- 1.15 The High Court has indicated that matters in averments ‘should be stated fully and with precision’,²² and courts have been cautious in their treatment of averments, perceiving the ‘possibility of injustice arising from their use’.²³ The courts have identified a number of limitations on the use of averments. Averments do not make evidence admissible which is otherwise inadmissible,²⁴ and may not be made stating opinion,²⁵ irrelevant facts,²⁶ or ‘evidence supporting the allegation of the offence’.²⁷
- 1.16 The use of section 255 of the *Customs Act 1901* is also subject to specific statutory limitations:
- under subsection 255(1), the ability to make averments under section 255 is limited to Customs prosecutions under the Act;²⁸
 - under subsection 255(2), an averment made under section 255 concerning a mixed question of law and fact will establish *prima facie* evidence of the fact only;
 - under subsection 255(4), averments made under section 255 cannot be used in relation to ‘proceedings for an indictable offence or an offence directly punishable by imprisonment’²⁹ or to establish *prima facie* evidence of the intent of the defendant.
- 1.17 Other Commonwealth Acts containing averment provisions may also specify limitations on their use.
- 1.18 Section 255 also provides that any evidence given by witnesses in support or rebuttal of a matter averred under the section ‘shall be considered on its merits’, and that the credibility and value of the

22 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 501; *Charlton v Rogers; Ex parte Charlton* (1985) 20 A Crim R 243.

23 *Gallagher v Cendak* (1988) VR 739.

24 *R v McStay* (1945) 7 ATD 527 (HC); ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.150.

25 *Australasian Jam Company Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23.

26 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 501.

27 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 501.

28 Section 244 of the Act defines a Customs prosecution as proceedings by Customs for the recovery of penalties under the Act (excepting certain pecuniary penalties relating to narcotics dealing and diesel fuel rebate contraventions), or proceedings by Customs for the condemnation of ships, aircraft or goods seized as forfeited.

29 Section 4G of the *Crimes Act 1914* defines indictable offences as offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears.

evidence will not be increased or diminished by reason of the section (subsection 255(3)).

Previous Reviews Dealing with Averment Provisions

1.19 The Committee notes that averment provisions, including section 255 of the *Customs Act 1901*, have received considerable attention in the course of previous inquiries and reviews. Some of the main conclusions and recommendations that have emerged in relation to averment provisions are summarised below.

Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings* (1982)

1.20 Over the course of 1980-82 the Senate Standing Committee on Constitutional and Legal Affairs conducted an inquiry into statutory provisions imposing a burden of proof upon defendants. In its 1982 report, the Committee recognised that there was a 'legitimate need for [averment] provisions, especially in circumstances where the prosecutor faces an insurmountable difficulty of proof'.³⁰ The Committee also stated that:

The comparatively substantial increase in the number of averment provisions in recent years coupled with the potential for abuse by prosecutors has lead [sic] us to the conclusion that there should be restrictions on their use.³¹

1.21 Accordingly, the Committee made the following recommendations:

- (a) As a matter of legislative policy averment provisions should be kept to a minimum.
- (b) The Parliament should enact legislation to ensure that existing and future averment provisions are only resorted to by prosecutors in the following circumstances:
 - (i) where the matter which the prosecution is required to prove is formal only and does not in itself relate to any conduct on the part of the defendant; or
 - (ii) where the matter in question relates to conduct of the defendant alleged to constitute an ingredient

30 SSCCALA, *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, p.71. The Committee noted section 255 of the *Customs Act 1901*.

31 SSCCALA, *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, p.71.

in the offence charged and is peculiarly within the defendant's knowledge.

- (c) When seeking to rely upon averment provisions, prosecutors should have regard to the following criteria:
- (i) averments should be so stated that they are sufficient in law to constitute the charge;
 - (ii) the facts and circumstances constituting the offence should be stated fully and with precision;
 - (iii) the Crown should not aver matters of law or matters of mixed fact and law;
 - (iv) averments should not amend or alter the rules of pleading or those regulating the statement of the offence;
 - (v) averments should be restricted to the ingredients of the charge and informations should not contain evidentiary material.³²

1.22 In his response to the Committee's report, the Commonwealth Attorney-General stated that:

Evidentiary aid provisions should only cast an evidential burden on the defendant and should only be relied on for proof of matters which are essentially formal in nature.

The Committee's recommendations in relation to averment provisions have been adopted in consideration of Commonwealth legislation. However, it is not proposed at this time to enact special legislation in this area.³³

Commonwealth Attorney-General's Department, *Review of Commonwealth Criminal Law (1991)*

- 1.23 In 1987 a Committee was established by the Commonwealth Attorney-General to review Commonwealth criminal law. The Committee included a consideration of averment provisions in its 1991 Final Report. The Committee noted the recommendations of the 1982 Senate Standing Committee, but did not support the enactment of specific legislation to limit the use of averments because 'Parliament could not by one Act bind future Parliaments' and

32 SSCCALA, *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, pp.73-74.

33 Quoted in AGD, *Review of Commonwealth Criminal Law Final Report*, December 1991, AGPS, Canberra, p.62.

‘...there [are] limits to what can be achieved by a law as to construction of future Acts’.³⁴

- 1.24 The Committee took it as a basic general requirement that averment provisions should not be used to prove the intent of a defendant or where an offence is directly punishable by imprisonment (the Committee recognised that section 255 of the *Customs Act 1901* satisfies this requirement).³⁵ This aside, the Committee considered averment provisions in revenue and non-revenue legislation separately. In the case of revenue legislation (such as the *Customs Act 1901*), the Committee, noting that the Australian Law Reform Commission (ALRC) was at the time engaged in a review of Customs and Excise legislation, refrained from considering the matter further:

...the question of what may be included in averments under revenue legislation... is best deferred until the A.L.R.C. has dealt with the subject of averments under Customs and Excise legislation in connection with its review of that legislation.³⁶

Australian Law Reform Commission, *Report No 60: Customs and Excise (1992)*

- 1.25 Over the course of 1987-1992 the ALRC conducted a review of the *Customs Act 1901* and the *Excise Act 1901*. In its 1992 report (ALRC 60) the ALRC concluded that:

...there is a need for averments in customs prosecutions in certain circumstances, principally where the evidence is located overseas, where the averment deals with formal or non-controversial matters, and where matters are such that they could easily be disposed of by the defendant without unfairness.³⁷

- 1.26 The ALRC also concluded, however, that ‘averments are capable of abuse’.³⁸ The ALRC noted the recommendations of the 1982 Senate

34 AGD, *Review of Commonwealth Criminal Law Final Report*, December 1991, AGPS, Canberra, p.62.

35 AGD, *Review of Commonwealth Criminal Law Final Report*, December 1991, AGPS, Canberra, pp.63-64.

36 AGD, *Review of Commonwealth Criminal Law Final Report*, December 1991, AGPS, Canberra, p.67.

37 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.150.

38 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.150.

Standing Committee but did not support the enactment of specific legislation along the lines recommended by the Committee:

The Commission does not consider that enactment of codified legislation setting out precisely what averments may or may not be allowed is a desirable approach. The result could be arbitrary and may not meet the needs of a particular case.³⁹

- 1.27 The ALRC also observed that, in the context of a Customs prosecution, 'leaving the matter [of averments] to the trial could prejudice the accused and if averments are disallowed could lead to delay and cost'.⁴⁰ The ALRC expressed a preference for the resolution of averments issues prior to the commencement of the trial phase:

...averments should be subject to judicial control at the pre-trial stage of the prosecution so that the need for them can be ascertained and no unfairness to the defendant will result. ...The preferred approach is to allow the court to consider the question at a directions hearing.⁴¹

- 1.28 The major proposal emerging from the review was a draft Customs and Excise Bill designed to replace the two current Acts dealing with these matters. The ALRC included an averment provision in the draft Bill (clause 487) which largely reproduced section 255 of the *Customs Act 1901*, but which also contained a new component giving courts the discretion to disallow averments on the basis of injustice to the defendant:

- (5) If it would be unjust to allow the prosecutor to rely on an averment, the court may, by order, on a directions hearing, disallow the averment.
- (6) Without limiting the matters that the court is to take into account for the purposes of subsection (5), the court is to take into account the following:
 - (a) whether the averment is of a matter that is merely formal or is not substantially in dispute;
 - (b) whether the prosecutor is in a position to adduce evidence of the matter and if the prosecutor is not in such a position, whether because the evidence is overseas or for some other reason, obtaining the evidence would result in undue cost or delay;

39 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.155.

40 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.155.

41 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II pp.150, 155.

- (c) whether the defendant is reasonably able to obtain information or evidence about the matter;
- (d) what admissions, if any, the defendant has made in relation to the matter.

(7) The prosecutor cannot rely on a disallowed averment.⁴²

1.29 The ALRC noted that, under the provision:

The whole question of allowing or disallowing averments involves a task of balancing a number of considerations. The factors which the court can take into account indicate that clearly enough. It is injustice to the defendant and not some minor disadvantage which will lead to the averments being disallowed.⁴³

Australian Law Reform Commission, *Report No 95: Principled Regulation: Federal Civil & Administrative Penalties in Australia* (2002)

1.30 The ALRC considered Customs prosecutions as part of its 2000-2002 inquiry into Commonwealth laws relating to the imposition of civil and administrative penalties. In its 2002 report (ALRC 95), the ALRC noted the views expressed in ALRC 60 regarding averment provisions and endorsed the expansion of section 255 recommended therein:

As recommended in the ALRC's report, *Customs and Excise* (ALRC 60, 1992), averments may be disallowed in any proceedings by the court if it is of the view that they would be unfair to the accused.⁴⁴

1.31 In terms of the ALRC's broader consideration of Customs prosecutions in the inquiry, a key recommendation was the removal of the concept of a Customs or Excise prosecution from the legislation and the clear reclassification of relevant offences as either criminal or civil in nature.⁴⁵ Within this context, the ALRC also recommended that the legislation be amended to 'specify in relation to each criminal offence whether averments are to be permitted.'⁴⁶ The ALRC noted

42 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. I pp.278-279.

43 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.156.

44 ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.485 (Recommendation 13-2).

45 ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.485 (Recommendation 13-1).

46 ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.485 (Recommendation 13-1).

however, that, within this context, 'it should be left to Parliament to debate the merits of the averment process'.⁴⁷

- 1.32 A number of submissions to the Committee discussed both ALRC 60 and ALRC 95.

The Committee's Inquiry and Report

Referral of the Inquiry

- 1.33 On 27 March 2003 the House of Representatives Standing Committee on Legal and Constitutional Affairs resolved to conduct an inquiry into averment provisions in Australian Customs legislation. The inquiry followed the Committee's review of the Australian Customs Service *Annual Report 2001-02*.

Conduct of the Inquiry

- 1.34 An advertisement inviting submissions to the inquiry appeared in *The Australian* newspaper on 2 April 2003. Letters seeking submissions were also sent to a range of organisations likely to have an interest in the subject of the inquiry.
- 1.35 The Committee received 7 submissions, 20 supplementary submissions, and 6 exhibits.⁴⁸
- 1.36 Public hearings were held in Canberra on 23 June 2003 and Sydney on 24 July 2003.⁴⁹
- 1.37 Evidence relating principally to individual cases involving the use of the averment provisions in the *Customs Act 1901* was provided to the Committee in respect of two matters: *Comptroller-General of Customs v Tomson and Keomalavong* and *Noel Pearson and Co Pty Ltd & Another v Comptroller-General of Customs*.

47 ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.484.

48 A list of submissions is at Appendix A; a list of exhibits is at Appendix B.

49 A list of witnesses who gave evidence at the public hearings is at Appendix C.

The Report

- 1.38 In this report the Committee concentrates on the key issues identified in the evidence. The structure of the report reflects these issues.
- 1.39 Chapter 2 considers the appropriateness of the averment provisions in the *Customs Act 1901*. The Committee focuses on some of the main issues relating to the question of appropriateness and considers arguments both in support of and against the averment provisions. The Committee also notes the implications of the recent High Court decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* regarding the nature of Customs prosecutions.
- 1.40 In Chapter 3 the Committee examines the use of the averment provisions in *Comptroller-General of Customs v Tomson and Keomalavong*.

The Appropriateness of the Averment Provisions

- 2.1 As foreshadowed in Chapter 1, this chapter considers the appropriateness of the averment provisions in the *Customs Act 1901* ('the Act'). Much of the evidence not dealing principally with specific cases related to this overarching question.
- 2.2 In this chapter also the Committee notes the implications of the recent High Court decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* regarding the nature of Customs prosecutions.

Main Issues

- 2.3 The following discussion focuses on some of the main issues that emerged in relation to the question of appropriateness. The Committee considers the arguments in support of and against the availability of the averment provisions in the Act before arriving at its conclusions and recommendations.

Equity between the Parties, Misuse and Abuse, and Procedural Fairness

- 2.4 Issues of equity between the parties, the potential for misuse and abuse, and procedural fairness are fundamental to the question of the appropriateness of the averment provisions. These issues were raised

predominantly by the Customs and International Transactions Committee, Business Law Section, Law Council of Australia (CITC).

Equity between the parties

- 2.5 The CITC contended that the averment provisions in the Act are inequitable as they enable prosecutions to be brought that are not properly founded:

Proper justice systems require that there must be a balance between the rights of the State, its prosecutors and the general public (as potential defendants). At the moment, the Committee believes that in the area of Customs... the balance is now weighed heavily in favour of the State. ...when one analyses the use of averments, it means that the prosecution is charging a person with an offence without having sufficient evidence of the elements of that offence.¹

- 2.6 The ACS rejected the contention of the CITC:

While averments may be relied on because of the difficulty or expense of obtaining admissible evidence or formal proof of some elements of an offence, they are not used speculatively. ...before an averment is made, there must be some proper basis for the fact averred found in the materials obtained as a result of an investigation.²

- 2.7 The ACS added that it is 'extremely rare'³ for a Customs prosecution to be undertaken without evidence being adduced in support of matters which are averred. The ACS further indicated that, before any charges are laid in a prosecution, the brief of evidence that has been assembled is sent to the Australian Government Solicitor (AGS) for consideration and advice regarding the adequacy of the evidence and the prospects for success.⁴ The ACS also stated that the AGS, in considering the use of averments in a prosecution, 'does not go beyond the evidence in the brief' and 'does not allege matters for which there is no factual basis among the materials provided by Customs'.⁵

1 CITC, *Submission 3*, pp.11-12.

2 ACS, *Submission 4.1*, p.6.

3 ACS, *Submission 4.1*, p.7.

4 ACS, *Submission 4*, p.8.

5 ACS, *Submission 4*, p.8.

- 2.8 In evidence provided to the Committee, the AGS stated that its relationship with the ACS is that of solicitor and client and confirmed its advisory role in Customs prosecutions.⁶ The AGS also corroborated the statement of the ACS that averments are not made without some evidential footing:

Averments are not sworn just to establish a case that can go to court. You do not have an averment prepared unless there is some evidential support for that averment. It may not be admissible, for example, because it is overseas, but Customs has to have evidence which makes it clear enough to them that there is evidence to support an averment so it is not just an averment which is done on speculation. There must be material to support that.⁷

- 2.9 The Committee recognises that this is a difficult issue. The concern of the CITC is understandable; yet, at the same time, the Committee is mindful of the avowals of the ACS and the AGS that averments are not used without an evidential basis. The submission of the ACS also indicates that this issue is bound-up with certain evidentiary justifications for using the averment provisions in the Act. These justifications are considered separately at paragraphs 2.28 – 2.35 below. The Committee believes that the ACS's practice of seeking advice from the AGS on potential Customs prosecutions is an important check and should be maintained, especially where averments are a potential element of the prosecution's case.

Misuse and abuse

- 2.10 The CITC, along with the Customs Brokers & Forwarders Council of Australia Inc. (CBFCA), also raised the issue of the potential for misuse and abuse of the averment provisions in the Act.⁸ The CITC noted the ALRC's conclusion, in ALRC 60, that averments are capable of abuse,⁹ and drew the Committee's attention to the cases of *Narelle Maree Walsh, Delegate of the Chief Executive Officer of Customs v Allegretta & Anor*,¹⁰ and *Chief Executive Officer of Customs v Alex*

6 Mr Simon Daley, *Transcript of Evidence*, 23 June 2003, p.77.

7 Mr Simon Daley, *Transcript of Evidence*, 23 June 2003, p.77. See also Mr Simon Daley, *Transcript of Evidence*, 24 July 2003, p.198.

8 CITC, *Submission 3*, pp.9-11, 13; Customs Brokers & Forwarders Council of Australia Inc. (CBFCA), *Submission 2*, p.2.

9 CITC, *Submission 3*, p.8. See ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.150.

10 [1999] WASC 136. Decision of the Supreme Court of Western Australia.

Amron.¹¹ In the *Walsh* case, the plaintiff averred that there was a business partnership between the first and second defendants, or, alternatively, that the first defendant was a sole proprietor. The CITC submitted that:

In the case, the Judge came to the conclusion that the Averments had been improperly made as to facts in the alternative and that, further, the Averments could not be severed to afford prima facie evidence of alleged facts against both defendants. ... This case represents an example of a situation in which the Averments have been made in an inappropriate and improper fashion taking Court time and expense.¹²

- 2.11 The judgment in the *Walsh* case, provided to the Committee by the CITC, does not support the CITC's contention that Justice White found the averment to have been improperly made as to facts in the alternative. While Justice White did find that the averment could not be severed so as to provide *prima facie* evidence of the alleged partnership, he in no way censured the averment or found it to be improper. Justice White's conclusion was simply that the averment was not successful regarding the second defendant:

...in my view, the plaintiff is not assisted by the provisions of those sections of *the Customs Act 1901* or the *Excise Act 1901* to which I have referred [sections 255 and 144 respectively] in establishing the case against the second defendant. Accordingly, I dismiss the case as against the second defendant.¹³

- 2.12 The Committee therefore agrees with the submission of the ACS that Justice White did not 'criticise... the form of the averments'.¹⁴

11 [2001] VSC 373. Decision of the Supreme Court of Victoria.

12 CITC, *Submission 3*, p.10.

13 CITC, *Submission 3*, p.68.

14 ACS, *Submission 4.1*, p.9. The CITC also drew the Committee's attention to a recent decision of the Court of Appeal of the Supreme Court of Victoria, *El Hajje v Chief Executive Officer of Customs* [2003] VSCA 217, where the Court found that an averment made by the ACS had inappropriately stated a decisive fact without also setting out the circumstances establishing that fact. This averment was made solely under section 144 of the Commonwealth *Excise Act 1901*, which is outside the terms of reference for the Committee's inquiry. Given that section 144 is virtually identical to section 255 of the *Customs Act 1901*, however, the Committee notes the decision. CITC, *Submission 3.2*, pp.1-3.

2.13 In the *Amron* case, the plaintiff made a number of averments both as to fact and intent. The CITC submitted that the Court was required to engage in a lengthy consideration process in order to ascertain which averments were acceptable as averments of fact and which were unacceptable as averments of intention.¹⁵ For the CITC, this:

...exemplifies the problems which arise in practice from the retention of the Averment process and provides another reason why the Averment process should not be retained.¹⁶

2.14 The ACS disagreed with the CITC that there was any lengthy consideration of the averments issue:

The AGS instructing solicitor has confirmed that... perhaps 20 to 30 minutes of court time was all that was involved in dealing with all averment issues during the hearing. The use of averments in this case saved Court time as not all of the witnesses had to be called to give evidence.¹⁷

2.15 An examination of the judgment reveals that a reasonable, although not excessive, proportion of the decision is taken up with a consideration of the averments issue. This does not of itself signify an abuse of process. For the Committee, the real issue here is not so much the court time absorbed by considering the averments, but the fact that averments were made as to intent. This means that, in the framing of the averments, the restriction in subsection 255(4) of the Act regarding intent must have been disregarded – a clear misuse of the averment process available under section 255. From the Committee's perspective, the *Amron* case illustrates both the potential for the misuse of averments and the need for averments to be carefully and appropriately prepared within the boundaries set by the Act.

2.16 The Committee's attention was also drawn to the case of *Noel Pearson and Co Pty Ltd & Another v Comptroller-General of Customs*.¹⁸ This complex matter, involving several court proceedings, began as a Customs prosecution based on a charge of evading Customs duty payable on the importation of washer extractor machines. Averments were made by the ACS in order to establish a number of matters

15 CITC, *Submission 3*, pp.10-11. See also the comments of the ALRC in ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.479.

16 CITC, *Submission 3*, p.11.

17 ACS, *Submission 4.1*, p.11.

18 Mr Benson, *Submissions 7-7.2*.

including the capacity of the machines.¹⁹ While not revealing of any misuse or abuse, the averments in this case appear to have contributed to some procedural difficulties.²⁰ For the Committee, this indicates that there is potential for averments to complicate proceedings in Customs prosecutions.

Procedural fairness

2.17 The CITC submitted that the averment process breaches the right to procedural fairness contained in the International Covenant on Civil and Political Rights.²¹ The CITC argued that obliging the defendant to disprove allegations ‘means that the trial process in [sic] not fair’,²² thereby breaching Article 14.1 of the Covenant. Article 14.1 states, in part, that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2.18 The Committee does not see that procedural fairness is eroded by the availability of averments under the Act, or that Article 14.1 is breached. As noted in the previous chapter, there is no burden on defendants to disprove matters averred.²³ More importantly, the fairness of a hearing will not be compromised by the use of averments, for the legitimacy and ultimate success of averments will be determined by the court as an independent and impartial tribunal. In the recent *Labrador* decision, the High Court stated that:

It will, in every case, be a matter for the judge to say, on the whole of the material, whether the facts are established to the requisite degree of proof. The judge may, but need not, treat what is properly averred as establishing that degree of proof.²⁴

19 Mr Benson, *Submission 7.1*, pp.22-23.

20 Mr Benson, *Submission 7.1*, pp.10-13.

21 Entered into force for Australia 13 November 1980; set out in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act 1986*.

22 CITC, *Submission 3*, p.9.

23 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [142] per Hayne J.

24 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [142] per Hayne J.

- 2.19 In the context of criminal matters, it is also important to recognise that, under subsection 255(4) of the Act, averments made under section 255 cannot be used to establish intent, or in proceedings for indictable offences or offences directly punishable by imprisonment. The court will have regard to both these statutory limitations and the limitations identified by judicial authority.²⁵
- 2.20 The CITC also contended that the averment process breaches Article 14.3(g) of the Covenant. Article 14.3(g) states that:
- In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality;
- (g) Not to be compelled to testify against himself or to confess guilt.
- 2.21 The CITC argued that the use of averments compels defendants to give evidence against themselves, thus constituting a breach of Article 14.3(g).²⁶ The Committee does not see that the averment process in the Act breaches Article 14.3(g). There is nothing in section 255 of the Act which compels defendants to testify, let alone in a self-incriminatory fashion or in confession of guilt.

Evidentiary Issues

- 2.22 The status and availability of evidence in Customs prosecutions is central to both the use of the averment provisions in the Act and the question of their appropriateness. The evidence raised three main issues:
- the status of some evidence as formal and non-controversial;
 - problems encountered in accessing and obtaining evidence; and
 - evidence that is within the knowledge of the defendant.

Formal and non-controversial matters

- 2.23 The ACS submitted that the averment provisions in the Act should continue to be available due to their usefulness in establishing formal and non-controversial matters. Referring to ALRC 95, the ACS noted that the ALRC:

25 See Chapter 1 for a summary of the limitations identified by judicial authority.

26 CITC, *Submission 3*, p.9.

...acknowledged that averments are often used for proving formal and non-controversial matters, such as the date of arrival of a ship, the rate of exchange of foreign currency or the authority of the informant to commence prosecutions.²⁷

- 2.24 The CITC noted this finding by the ALRC as well.²⁸ The ACS indicated that averments can also be used:

...on matters of fact to which judicial notice would ordinary [sic] be given. For example, a carton of cigarettes wrapped and labelled in the ordinary way may be averred to be a carton of cigarettes; that the number of packets mentioned on the carton as being inside is the actual number of packets etc...²⁹

- 2.25 The ACS submitted that the use of averments for these types of matters avoids unnecessary investigation and disputation over facts that are not seriously in contention.³⁰ The ACS stressed that, without the use of averments in such matters, 'each aspect could become an issue of technical objection otherwise requiring Customs to present evidence on every factual issue'.³¹
- 2.26 In its submission, the AGD indicated that the use of averments can be justified where it relates to 'formal and technical matters'.³²
- 2.27 There is obvious practical virtue in using averments to establish formal and non-controversial matters or matters usually given judicial notice. This enables straightforward evidentiary matters to be dealt with promptly and avoids unnecessary investigation and potentially disingenuous delays in the court process. The Committee considers therefore that establishing formal and non-controversial matters is a reasonable and appropriate use of the averment provisions in the Act.

Evidentiary problems

- 2.28 The ACS also argued for the continued availability of the averment provisions on the basis that they are necessary in cases where the prosecution cannot access evidence that is located overseas:

27 ACS, *Submission 4*, p.13. See ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.479.

28 CITC, *Submission 3*, p.4.

29 ACS, *Submission 4*, p.13.

30 ACS, *Submission 4*, p.13.

31 ACS, *Submission 4*, p.13.

32 AGD, *Submission 5*, p.3.

The necessity for averments arises where the prosecutor is not in a position to adduce evidence because it is from overseas and witnesses have to be willing to leave their homeland to testify...³³

2.29 The ACS indicated that this sort of evidentiary deficiency is a common feature of Customs prosecutions:

The condition precedent to a typical Customs prosecution is the arrival of goods from abroad. Inevitably, most everything to do with the purchase and transport of goods from abroad will have a foreign component. Unlike purely domestic crime, evidence of all those components will rarely be available – the negotiations may take place overseas, contracts may be signed there, the payment will be received there, and sometimes made there, and witnesses to the truth of these matters and the documents which support them will often be located there.³⁴

2.30 This deficiency means that a range of factual matters are frequently averred, including:

- the transportation of goods into Australia from another country;
- the ownership or purchase of the goods by a defendant;
- the arrangement of the purchase of the goods by the defendant with a particular person or business overseas;
- the nature or description of the goods;
- the arrival of the goods on a particular date by specific means;
- the transportation of goods from one location to another; and
- the inaccuracy of the price or description of the goods as furnished by the defendant.³⁵

2.31 The Committee acknowledges that averments may be necessary in Customs prosecutions involving overseas evidence that simply cannot be obtained.³⁶ This aside, however, the Committee is of the view that secured evidence, regardless of whether it is obtained

33 ACS, *Submission 4*, p.7.

34 ACS, *Submission 4*, p.6.

35 ACS, *Submission 4*, p.7.

36 In ALRC 60 the ALRC recognised that problems arising from the location of evidence overseas can result in a need for averments. See ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II pp.150, 152-153.

overseas or within the Australian jurisdiction, should be relied upon in Customs prosecutions, and that averments should not, except in exceptional circumstances, be used in its place.

- 2.32 The ACS stated that averments are also necessary in situations where evidence cannot be adduced by the prosecution because 'the obtaining of it would result in undue cost or delay'.³⁷ This difficulty might arise, for example, in cases where:

...goods are shipped, and statements are required from the owners of shipping lines and the captains of container vessels who land goods and return to international waters for extended periods, from stevedores and warehousemen, from every wharf, depot, freight and trucking operator involved.³⁸

- 2.33 The ACS cited unlawful importation by post as exemplifying this sort of difficulty due to the untraceable nature of the transaction:

The proliferation of illicit importations via international post now exacerbates the difficulties of proof... Those availing themselves of the postal method of importing to circumvent barrier controls recognise that, in doing so, they do not risk being intercepted in person or leaving a ready documentary trail linking them to their importations. They do not engage customs brokers, arrange delivery or sign documents.³⁹

- 2.34 The CITC did not agree that evidentiary difficulty is a justification for the continued availability of the averment provisions in the Act. The CITC pointed to additional powers made available to the ACS under recent legislation:

...recent changes to the Customs Act... have conferred significant new audit powers on Customs. Additional intelligence and physical examination powers have been granted to Customs with the Border Security Legislation and Cargo Examination Facilities. The combination of all these factors means Customs powers far exceed those previously held by Customs.⁴⁰

- 2.35 The Committee accepts that the changes outlined by the CITC, particularly in the context of evolving technology, should have an
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37 ACS, *Submission 4*, p.7.

38 ACS, *Submission 4*, p.8.

39 ACS, *Submission 4*, p.8.

40 CITC, *Submission 3*, p.4. See also Mr Andrew Hudson, *Transcript of Evidence*, 23 June 2003, pp.84-85.

impact on the evidentiary difficulties that have faced the ACS in Customs prosecutions. The Committee recognises, however, that such advances are unlikely to bring about the complete resolution of these difficulties. There will almost certainly continue to be situations where the requisite evidence cannot be adduced by the ACS, particularly in complex cases and in cases involving illicit importation by post. The Committee acknowledges therefore that averments may still be necessary in Customs prosecutions where obtaining all of the requisite evidence would be so difficult or costly as to be unfeasible.

Matters within the knowledge of the defendant

2.36 The ACS further argued for the continued availability of the averment provisions in the Act on the basis that they are necessary in cases where the defendant has knowledge of matters considerably beyond that of the prosecution:

...the availability of averments recognises the peculiar difficulties which Customs faces in proving offences arising out of the importation of goods because the elements of such offences will concern matters about which the importer will inevitably have far greater knowledge than Customs.⁴¹

2.37 In its submission, the AGD noted that the use of averments can be justified where ‘matters are peculiarly within the defendant’s knowledge’.⁴²

2.38 The Committee recognises that situations where a defendant has detailed knowledge of matters significantly beyond that of the prosecution will present a difficulty where that knowledge is necessary to the conduct of the prosecution’s case. The Committee therefore accepts that use of the averment provisions in the Act may be necessary in such circumstances.

2.39 The Committee is conscious, however, that there is potential for averments to be exploited in this area, particularly in situations where the defendant may not be in a position to adduce evidence in rebuttal of the matter(s) averred.

41 ACS, *Submission 4.1*, p.2. The ACS cited the recognition of this disparity in the early High Court case of *The King v Albert C. Lyon* (1906) 3 CLR 770. See ACS, *Submission 4*, pp.5-6.

42 AGD, *Submission 5*, p.3.

Issues of Proof

- 2.40 A number of submissions raised the question of proof in relation to the use of the averment provisions in the Act. Two key issues are, firstly, the position of defendants regarding matters established *prima facie* by averments, and, secondly, proof in criminal cases.

The position of defendants regarding matters established *prima facie* by averments

- 2.41 The ACS submitted that ‘The effect of section 255 is that it makes the allegation of a fact *prima facie* evidence only – it does not reverse the onus of proof in relation to that fact.’⁴³ This is consistent with the judicial principle, noted in the previous chapter, that a defendant is not under a burden to disprove matters that are averred.⁴⁴ Subsection 255(3) of the Act allows for witness evidence to be called in rebuttal (or in support) of matters averred under section 255, and provides that such evidence will be assessed by the court on its merits:

- (3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section.

- 2.42 The Committee agrees with the approach taken in this provision. Specifying a particular standard for evidence to reach in order for it to be successful would not allow for variations in individual case circumstances, and would risk the exclusion of evidence with probative value.
- 2.43 The CITC pointed out that the difficulty and/or expense encountered by the prosecution in obtaining evidence, giving rise to the need for averments, might equally be faced by the defendant in obtaining evidence for the purposes of rebutting the matters averred.⁴⁵ The Committee shares this concern, particularly given that, as the CITC also pointed out, defendants do not have the resources of the state at their disposal.⁴⁶ It is quite conceivable that a defendant could be faced with considerable difficulty and/or expense in obtaining evidence to

43 ACS, *Submission 4*, p.4.

44 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [142].

45 CITC, *Submission 3*, pp.12-13.

46 CITC, *Submission 3*, p.13.

rebut a matter averred, particularly where that matter had overseas elements. In such a situation the capacity of the defendant to rebut the matter averred would be diminished, even though decisive evidence might exist. This will not of course arise in every Customs prosecution, but the Committee is of the view that the potential difficulties facing defendants in rebutting averred matters is a material issue.

Criminal cases

2.44 In criminal cases, the prosecution is usually required to prove, beyond a reasonable doubt, every element necessary to establish the alleged offence.⁴⁷ Any fact that is necessary to support an element of the offence must therefore be proved by the prosecution to the same standard.⁴⁸ As noted in the previous chapter, it is established by judicial authority that the use of averments in criminal prosecutions does not reverse this onus on the prosecution.⁴⁹ In the situation where a matter necessary to support an element of the offence was averred, however, it could appear that the burden was being diminished.⁵⁰ The AGD stated that:

Commonwealth criminal law policy conforms to the view underpinning the *Criminal Code*, namely that generally averment provisions are inappropriate as they remove from the prosecution the usual burden of establishing facts that may constitute an offence.⁵¹

2.45 As noted in the previous chapter, the High Court has indicated that it is not acceptable for an averment to 'set out evidence supporting the allegation of the offence'.⁵² This limitation, then, will militate against the courts accepting averments that support an element of an offence, thus preventing any diminishment of the burden of proof on the prosecution. In the recent *Labrador* decision, the High Court also

47 *Cassell v The Queen* (2000) 201 CLR 189 at 194 per Kirby J. See also ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II at p.149.

48 *Cassell v The Queen* (2000) 201 CLR 189 at 194 per Kirby J.

49 Noted by both the ACS and the AGD. See ACS, *Submission 4.1*, pp.4-5; AGD, *Submission 5*, p.3.

50 In ALRC 60 the ALRC suggested that averments 'represent a substantial qualification to the fundamental principle that, in criminal prosecutions, the onus should lie upon the prosecution'. See ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.149.

51 AGD, *Submission 5*, p.3.

52 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 501.

indicated that if the prosecution does aver a matter that is an element of the offence, and evidence is given in rebuttal of the averment, the prosecution will need to persuade the court of the matter averred.⁵³ The Court further indicated that, where proof beyond reasonable doubt is the applicable standard, the averment provisions in the Act ‘neither suggest nor require departure’ from the necessity of the matter being proved to this standard.⁵⁴

- 2.46 In terms of statutory limitations, section 13.6 of the Commonwealth *Criminal Code* provides that, for criminal offences established by Commonwealth legislation, a law allowing the prosecution to make an averment does not allow the prosecution to make averments regarding any fault element of an offence (i.e. regarding the mental state of the defendant). Section 13.6 also provides that such a law does not allow the prosecution to make averments in prosecuting for an offence that is directly punishable by imprisonment.
- 2.47 Section 13.6 of the *Criminal Code* applies to all Commonwealth criminal offences unless it is expressly excluded.⁵⁵ Under section 5AA of the Act, section 13.6 does not apply to Customs prosecutions. However, as the AGD noted, subsection 255(4) of the Act provides comparable safeguards to those set out in section 13.6 of the *Criminal Code*.⁵⁶ Indeed, as the AGD also noted, the restriction in subsection 255(4) on using averments in proceedings for indictable offences as well as in proceedings for offences directly punishable by imprisonment is ‘theoretically broader’⁵⁷ than the corresponding component of section 13.6 of the *Criminal Code*.
- 2.48 The Committee considers that the limitations and requirements identified by the High Court regarding the use of averments are crucial. The Committee is also of the view that the limitations in subsection 255(4) are appropriate and substantial, particularly given that they provide a comparable or higher level of protection to that in the Commonwealth *Criminal Code*. Since, in a criminal case, the prosecution will usually need to demonstrate intention to commit the

53 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [144] per Hayne J.

54 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [144] per Hayne J.

55 AGD, *Submission 5*, p.3.

56 AGD, *Submission 5*, p.4. The limitations specified in section 255 are summarised in Chapter 1.

57 AGD, *Submission 5*, p.4.

offence,⁵⁸ it is especially important that subsection 255(4) prevents averments made under section 255 from being used to establish intent on the part of the defendant.

2.49 The CITC submitted that the availability of averments places Australia in breach of its obligations under Article 14.2 of the International Covenant on Civil and Political Rights:

Amongst the rights so recognised [in the Covenant] is that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty (Art 14.2). The averment process reverses the onus and requires to [sic] defendant to disprove one or more element [sic] of the alleged offence. The averment system breaches the Convention.⁵⁹

2.50 Article 14.2 of the Covenant states that:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

2.51 The Committee does not see that the availability of the averment process in the Act compromises the presumption of innocence or constitutes a breach of Article 14.2. To begin with, there is no burden on defendants to disprove matters averred. It is also established that, in criminal cases, the burden on the prosecution to prove its case beyond a reasonable doubt is not reversed by the use of averments. This indicates that the presumption of innocence is not eroded by the presence of averments.

Conclusions

Proposals put to the Committee

2.52 Both the CITC and the CBFCA proposed abolition of the averment provisions in the Act.⁶⁰ The CITC also proposed that, in the event of the Committee supporting retention of the averment provisions, the retention should be in a format that is:

58 Subject to the relevant statutory provisions establishing the offence. Strict liability offences will not require the demonstration of intention or recklessness.

59 CITC, *Submission 3*, pp.8-9. See also Mr Andrew Hudson, *Transcript of Evidence*, 23 June 2003, p.83.

60 CITC, *Submission 3*, pp.12, 16; CBFCA, *Submission 2*, p.2.

...in accordance with the recommendations of the ALRC to ALRC 60 and ALRC 95 and the recommendations of the ALRC as set out in Recommendation 13-2 of ALRC 95.⁶¹

2.53 The CITC further proposed in this case that:

- guidelines should be developed by the ACS and interested parties setting out the appropriate use of the averment provisions. For example:
 - ⇒ averments should only be made by suitably trained delegates of the Chief Executive Officer of the ACS; and
 - ⇒ averments should only be made where there is a factual basis sufficient to support a prosecution.⁶²
- there should be recourse against the ACS for failure to observe the Guidelines or where averments are made contrary to section 255 of the Act. Averments that are shown to be false should attract the charge of perjury;⁶³
- in an application to disallow an averment (under the regime proposed in ALRC 60), or due to concerns that the averment has otherwise been improperly made, the defendant should be able to cross-examine ACS officers regarding the averment and compliance with the Guidelines;⁶⁴ and
- averments made in relation to as general a range of matters as possible should not be permitted.⁶⁵

2.54 The ACS submitted that the averment provisions in the Act should continue to be available in Customs prosecutions.⁶⁶ The ACS also stated that abolishing the averment provisions (specifically section 255) or reducing their effectiveness could have the following consequences:

- burdensome and costly evidence-gathering on formal and non-controversial matters, leading to delays in proceedings and

61 CITC, *Submission 3*, p.14. The CBFCFA also stated that 'Should averment [*sic*] be maintained then the CBFCFA sees merit in the format for retention noted in the ALRC Report 95': *Submission 2*, p.2.

62 CITC, *Submission 3*, pp.14-15.

63 CITC, *Submission 3*, p.15. The CITC recommended that the guidelines should be binding and a 'Disallowable Instrument', but did not indicate how this might be achieved.

64 CITC, *Submission 3*, p.15.

65 CITC, *Submission 3*, p.15.

66 ACS, *Submission 4*, p.22.

undermining the enforcement process by making some prosecutions uneconomic;

- increased prosecution costs;
- increased reliance on other regulatory mechanisms to alleviate higher enforcement costs; and
- increased difficulty for the ACS in proving its case due to the evidentiary problems particular to Customs prosecutions.⁶⁷

2.55 The AGD stated that it ‘would not support a complete prohibition’⁶⁸ on averment provisions:

...provided that there is a strong justification for the use of averments in the circumstances and provided the provision conforms to section 13.6 of the [*Criminal*] Code.⁶⁹

2.56 The justifications recognised by the AGD are noted at paragraphs 2.26 and 2.37 above.

The Committee’s position and recommendations

2.57 The Committee is not of the view that the averment provisions in the Act should be abolished. There are circumstances where the use of the averment provisions in a Customs prosecution, if necessary, will be appropriate:

- establishing formal and non-controversial matters or matters usually given judicial notice;
- where evidence is inaccessible due to its location overseas, or where obtaining all of the requisite evidence would be so difficult or costly as to be unfeasible; and
- where the defendant has detailed knowledge of matters significantly beyond that of the prosecution and that knowledge is necessary to the conduct of the prosecution’s case.

2.58 The Committee does believe however that where the ACS obtains evidence, whether overseas or within Australia, the evidence so obtained should be relied upon and averments should not be used in its place, except in exceptional circumstances. The Committee considers that this principle warrants codification in the Act.

67 ACS, *Submission 4*, pp.14-15.

68 AGD, *Submission 5*, p.3.

69 AGD, *Submission 5*, p.3.

Recommendation 1

- 2.59 **The Committee recommends that the *Customs Act 1901* be amended so as to provide that, where evidence for a Customs prosecution is obtained, whether outside or inside the Australian jurisdiction, the evidence so obtained should be relied upon by the prosecutor/plaintiff and the averment provisions in the *Customs Act 1901*, except in exceptional circumstances, are not to be used in place of or as a substitute for that evidence.**
- 2.60 The Committee is satisfied that the limitations imposed on the use of averments by judicial authority and by subsection 255(4) of the Act are considerable, particularly given that the latter provides at least the same level of protection as that provided by the Commonwealth *Criminal Code*.
- 2.61 The Committee however has some concerns regarding the use of the averment provisions in the Act. The Committee is of the view that there are a number of potential dangers associated with the use of averments in Customs prosecutions:
- as shown by the *Amron* case, there is potential for averments to be misused;
 - as shown by the *Pearson* case, there is potential for averments to contribute to procedural difficulties and complicate proceedings;
 - there is potential for averments to be exploited where they are made in respect of matters that are within the knowledge of the defendant; and
 - there is potential for defendants, due to difficulty and/or expense in obtaining evidence, to have a diminished capacity for rebutting matters averred by the prosecution.
- 2.62 The Committee considers that legislative change is warranted in order to reduce the potential for these situations to arise. As to the form that this change should take, the Committee does not favour discrete legislation dealing specifically with averments. The Committee concurs with the view of the ALRC in ALRC 60 that such legislation could be ‘arbitrary and may not meet the needs of a particular case.’⁷⁰

70 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.155. Also cited in the previous chapter.

- 2.63 The Committee agrees with the CITC that the desirable legislative changes to make are those set out in ALRC 60 and endorsed by Recommendation 13-2 of ALRC 95. The key component of this modification to the averment regime is the conferral of a discretion on the court to disallow averments at the pre-trial stage on the basis of injustice to the defendant. Matters for the court to take into account when deciding whether or not to disallow an averment are also specified.⁷¹ This strikes the Committee as an effective mechanism for ensuring that the undoubted utility of averments is carefully balanced against the possibility of injustice arising from their use.
- 2.64 The Committee does not agree with the CITC that, under this modified averments regime, the defendant should be able to cross-examine ACS officers. This would not be appropriate, given that the consideration of averments would take place at the pre-trial stage prior to their production as evidence.
- 2.65 The Committee does not consider it desirable, as recommended by the CITC, that the court under the modified averments regime should disallow averments made in relation to as general a range of matters as possible. This might not sufficiently allow for differences between cases, and could result in quite legitimate averments covering a breadth of material being disallowed. The courts are alert to the possibility of inappropriately broad averments and will, as noted in the previous chapter, expect averments to be framed precisely and to exclude irrelevant facts.⁷²

Recommendation 2

- 2.66 **The Committee recommends that provisions be inserted into the *Customs Act 1901* establishing a process whereby directions hearings are to be held prior to the commencement of the trial in Customs prosecutions where averments form part of the prosecutor's/plaintiff's case. A number of submissions to the Committee discussed Report 60 of the Australian Law Reform Commission, and the Committee endorses certain components of the proposal in that Report relating to summary trial directions hearings. The provisions establishing the directions hearing process should also, as set out in Report 60, enable the court to make orders on a directions hearing, without limiting the orders that can be made, as to:**

71 The full text of the ALRC proposal is cited in the previous chapter.

72 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 501.

1. **the just and efficient disposition of the proceeding, including orders for directions for the conduct of the proceeding;**
2. **the admissibility of evidence; and**
3. **the determination of a point of law.**

The Committee also endorses the components of the proposal in Report 60 relating to disallowable averments, and further recommends that provisions be inserted into section 255 of the *Customs Act 1901* so as to provide, as set out in Report 60, that:

1. **if it would be unjust to allow the prosecutor/plaintiff to rely on an averment, the court may, by order, on a directions hearing, disallow the averment;**
2. **without limiting the matters that the court is to take into account for the purposes of deciding whether or not to disallow an averment, the court is to take into account the following:**
 - ⇒ **whether the averment is of a matter that is merely formal or is not substantially in dispute;**
 - ⇒ **whether the prosecutor/plaintiff is in a position to adduce evidence of the matter and if the prosecutor/plaintiff is not in such a position, whether because the evidence is overseas or for some other reason, obtaining the evidence would result in undue cost or delay;**
 - ⇒ **whether the defendant is reasonably able to obtain information or evidence about the matter; and**
 - ⇒ **what admissions, if any, the defendant has made in relation to the matter.**
3. **the prosecutor/plaintiff cannot rely on a disallowed averment.**

2.67 One potential outcome of this mechanism would be the admission of fewer averments into evidence in Customs prosecutions, and the Committee is aware that this could mean fewer successful prosecutions with a concomitant fall in recovered revenue. Given that the purpose of the process is to avoid injustice, however, the Committee does not consider that budgetary concerns of this nature are pertinent.

2.68 The ACS indicated to the Committee that the Minister for Justice and Customs is of the view that the recommendations of ALRC 95 relating

to Customs prosecutions are acceptable to the Government.⁷³ The ACS also indicated that the Minister has written to the federal Treasurer and the Commonwealth Attorney-General seeking their agreement to announce the Government's acceptance of the recommendations.⁷⁴ On 18 December 2003 the ACS notified the Committee that correspondence between senior Government ministers on this issue was continuing.⁷⁵ The Committee supports the implementation of Recommendation 13-2.

- 2.69 The Committee notes however that, as Recommendation 13-2 does not refer to directions hearings, implementation of the ALRC 95 recommendations relating to Customs prosecutions would require the co-implementation of the first element of Recommendation 2 above establishing the directions hearing process (or the equivalent component of the changes proposed in ALRC 60) in order to facilitate the court's discretion to disallow averments.
- 2.70 The Committee also considers that the ACS's practice, prior to the commencement of a Customs prosecution, of referring the brief of evidence to the AGS for assessment and advice is an important procedural check, particularly where averments are a potential element of the prosecution case. This practice should be maintained.

Recommendation 3

- 2.71 **The Committee recommends that the Australian Customs Service's practice of referring briefs of evidence assembled towards possible Customs prosecutions to the Australian Government Solicitor for assessment and advice should be maintained.**
- 2.72 The Committee sees merit in the proposal of the CITC that there should be guidelines for ACS staff on the appropriate use of the averment provisions in Customs prosecutions. The guidelines should be developed by the ACS in consultation with relevant stakeholders and should cover a range of matters including the various limitations that apply to the use of the averment provisions. The Committee is also of the view that the guidelines should, to the greatest degree possible, be given force by being included in the *Customs Regulations 1926*.

73 Mr Lionel Woodward, *Transcript of Evidence*, 23 June 2003, p.70.

74 Mr Lionel Woodward, *Transcript of Evidence*, 23 June 2003, p.70.

75 ACS, *Submission 4.3*, p.1.

Recommendation 4

2.73 The Committee recommends that the Australian Customs Service, in consultation with relevant stakeholders, formulate guidelines for its staff on the appropriate use of the averment provisions in the *Customs Act 1901* in Customs prosecutions. The guidelines should:

- 1. clearly identify additional powers and improved techniques that are available to Customs officers when securing evidence;**
- 2. state that only suitably trained delegates of the Chief Executive Officer of the Australian Customs Service should make averments;**
- 3. state that the use of averments to establish formal and non-controversial matters or matters usually given judicial notice is appropriate;**
- 4. clearly set out the limitations on the use of averments provided for in subsection 255(4) of the *Customs Act 1901*; and**
- 5. clearly define the limitations on the use of averments identified by judicial authority.**

The Committee further recommends that, to the greatest degree possible, the guidelines be inserted into the *Customs Regulations 1926* in accordance with Part XVI of the *Customs Act 1901*.

The Nature of Customs Prosecutions and the *Labrador Decision*

The Position under the Act and Judicial Uncertainty

2.74 Under section 245 of the Act, Customs prosecutions for penalties above a certain amount (200 penalty units⁷⁶) cannot be proceeded with in State or Territory courts of summary jurisdiction. Prosecutions for penalties above 400 penalty units cannot be proceeded with in Local Courts in South Australia or the Northern Territory or in County Courts or District Courts. Thus the Act regulates the level of

⁷⁶ Under section 4AA of the *Crimes Act 1914*, 'penalty unit' in a Commonwealth law or Territory ordinance means \$110.00.

tribunal in which Customs prosecutions may be instituted according to the penalty amount involved.

- 2.75 Section 247 of the Act provides that Customs prosecutions for penalties commenced in the higher courts under section 245 may be proceeded with in accordance with the practice and procedure of the court in civil cases, or in accordance with the directions of the court or judge.
- 2.76 Section 248 of the Act provides that:
- ...the provisions of the law relating to summary proceedings in force in the State or Territory where the proceedings are instituted shall apply to all Customs prosecutions before a Court of summary jurisdiction in a State or Territory...
- 2.77 The effect of these provisions, in essence, is that the criminal rules of procedure will apply to Customs prosecutions in the lower courts, and the civil rules of procedure will apply in Customs prosecutions in the higher courts. Thus the criminal standard of proof (proof beyond reasonable doubt) should apply in prosecutions in the lower courts, and the civil standard of proof (proof on the balance of probabilities) should apply in prosecutions in the higher courts.
- 2.78 The ACS indicated that:
- The complexity of Customs prosecutions results from many years of statutory amendments, judicial interpretation and administrative practices. Whether they are regarded as civil or criminal, or even unique, also depends on the particular statutory context in which the question is asked.⁷⁷
- 2.79 The ACS, along with the CITC, also noted that there has been uncertainty among the courts regarding the application of civil or criminal rules of procedure and the appropriate standard of proof to be applied.⁷⁸ This has certainly been the case in regard to Customs prosecutions in the higher courts. In *Button v Evans*,⁷⁹ for example, the civil standard of proof was held to apply.⁸⁰ In *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce*,⁸¹ Kirby P

77 ACS, *Submission 4*, pp.9-10.

78 ACS, *Submission 4*, pp.10, 12; CITC, *Submission 3*, p.5. See also the comments of the ALRC in ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.470.

79 [1984] 2 NSWLR 338.

80 *Button v Evans* [1984] 2 NSWLR 338 at 353 per Carruthers J.

81 (1988) 85 ALR 640. Decision of the Supreme Court of New South Wales Court of Appeal.

formed the view that Customs prosecutions are hybrid proceedings, capable of being ‘assimilated to civil process (as s247 contemplates)’ but also ‘much more closely akin to criminal proceedings’.⁸² In *Comptroller-General of Customs v D’Aquino Bros Pty Ltd*,⁸³ Hunt CJ, noting the hybrid characterisation proposed in the *Brabham* case, took the view that Customs prosecutions are criminal in nature.⁸⁴ Nevertheless, the Court in this case eventually found that the civil standard of proof applied.⁸⁵

- 2.80 The ACS indicated that it ‘has consistently maintained that Customs prosecutions, as defined at s.244 of the Act, are civil or quasi-criminal proceedings.’⁸⁶

The *Labrador* Decision

- 2.81 In the recent *Labrador* decision, Kirby J reaffirmed his classification of Customs prosecutions as hybrid in the *Brabham* case and stated that ‘it is erroneous to seek “to classify proceedings as either ‘criminal’ or ‘civil’ such that never the twain would meet”. The two categories do not cover the relevant universe.’⁸⁷ Kirby J also stated that:

...in applying particular rules or procedures characteristic of criminal or civil proceedings to the provisions of the Federal Acts... it is essential to address the precise question that has to be resolved. There is no universal approach that can be adopted whatever the question in issue or the procedure to be classified.⁸⁸

- 2.82 Regarding the standard of proof to be applied, Kirby J went on to conclude that:

...the general language of s 247 of the *Customs Act* (and s 136 of the *Excise Act*) is not sufficient to relieve the prosecutor in a prosecution of the offences in question in these proceedings

82 *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1988) 85 ALR 640 at 652, 653.

83 (1996) 135 ALR 649. Decision of the Supreme Court of New South Wales Court of Criminal Appeal.

84 *Comptroller-General of Customs v D’Aquino Bros Pty Ltd* (1996) 135 ALR 649 at 661.

85 ACS, *Submission 4*, p.12.

86 ACS, *Submission 4*, p.11.

87 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [67]. Kirby J cites his earlier judgment in the *Brabham* case.

88 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [67].

of the standard of proof normally applicable to the proof of the elements of the “offence”. That subject does not fall within the “usual practice and procedure of the Court in civil cases”.⁸⁹

- 2.83 Hayne J commented similarly to Kirby J regarding the undesirability of an either/or classification of Customs prosecutions as civil or criminal.⁹⁰ In terms of the applicable standard of proof, Hayne J also came to the conclusion that, where a conviction is envisaged by the Act (and by the *Excise Act 1901*):

Absent statutory provision to the contrary, a conviction should not be recorded except where the requisite elements of the contravening conduct are established beyond reasonable doubt.⁹¹

- 2.84 Gummow J concluded similarly:

...the matter of the applicable standard of proof is... one of the principles of the common law “with respect to criminal liability”. That conclusion is not displaced by anything in the Customs Act, in particular by any of the three branches of s 247.⁹²

- 2.85 Gleeson CJ also concluded that ‘the common law requires that the appellant should establish the elements of the offences beyond reasonable doubt.’⁹³

- 2.86 Thus, in the *Labrador* decision, the High Court has provided support for the characterisation of Customs prosecutions as hybrid, and has also concluded that the appropriate standard of proof to be applied is the criminal standard. The Committee is of the view that this important clarification by the High Court regarding the standard of proof should be codified in the Act.

89 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [90].

90 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [114].

91 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [138].

92 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [32-33].

93 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [2].

Recommendation 5

- 2.87 **The Committee recommends that the *Customs Act 1901* be amended to codify the recent determination of the High Court of Australia in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* that the applicable standard of proof in Customs prosecutions is the criminal standard of proof (beyond reasonable doubt).**
- 2.88 The CITC submitted that the conclusion of the High Court on the issue of the standard of proof supports its position that ‘it is inappropriate to permit the use of Averments in Customs and Excise Prosecutions and the relevant Averment provisions should be removed.’⁹⁴
- 2.89 The Committee does not agree with this argument. There is nothing in the *Labrador* judgment to indicate that the High Court regards the use of the averment provisions in the Act as inappropriate. As outlined at paragraph 2.45 above, the Court stated that, where evidence in rebuttal of averments is given, the prosecution will need to persuade the court of the matter averred. Where the criminal standard is the applicable standard of proof, averments will ‘neither suggest nor require departure’ from the necessity of the matter being proved to this standard.⁹⁵ While the Court therefore specified a high standard for proving averred matters in certain circumstances, it did not criticise the use of averments and could be said to implicitly permit it.
- 2.90 The CITC also submitted that the comments of Hayne J indicate that:
- ...it is unlikely that Averments would, on their own support a successful prosecution... legislation for the use of averments should make it clear that it is inappropriate for a prosecuting authority to commence a prosecution where it relies totally or substantially merely on Averments...⁹⁶
- 2.91 The Committee considers that the success or otherwise of such averments will be a matter for the court to decide in each individual case and should not be pre-empted by legislation.

94 CITC, *Submission 3.1*, p.3.

95 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [144] per Hayne J.

96 CITC, *Submission 3.1*, p.3.

The Use of the Averment Provisions in *Comptroller-General of Customs v Tomson and Keomalavong*

- 3.1 As indicated in Chapter 1, this chapter examines the use of the averment provisions in the Act in the case of *Comptroller-General of Customs v Tomson and Keomalavong*. Evidence relating principally to this case was received from Mr Ian Rodda of Rodda Castle & Co¹ and from Mr Noel Balzary. The case was also covered by the ACS in its evidence.

Case History

Background to the Case

- 3.2 Mr Tomson was born in Laos and migrated to Australia in 1980. He subsequently established a business importing clothing goods from various parts of Asia.² In 1987 and 1988 the business imported several consignments of clothing goods into Australia from a number of firms in Thailand, Hong Kong and Taiwan as follows:

- importation from Steady Export Co, Thailand on 16 July 1987;

1 Mr Rodda provided evidence to the Committee on the basis of his knowledge of the *Tomson* case. Much of the evidence provided by Mr Rodda was extraneous to the terms of reference for the Committee's Inquiry, as Mr Rodda himself noted. See Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p.2.

2 Mr Rodda, *Submission 1*, p.9.

- importation from Gold Vincent & Co, Hong Kong on 29 July 1987;
 - importation from Winelux Enterprise Co, Taiwan on 7 August 1987;
 - importation from New Calcutta Store (1969) Ltd, Thailand on 24 September 1987; and
 - importation from Cameron Trading Co, Hong Kong on 28 March 1988.³
- 3.3 These importations became the focus of an investigation by the ACS concerning possible undervaluing of the goods for Customs purposes.⁴ In August 1987 an ACS intelligence report concluded that the importations appeared to constitute ‘ “a case of defrauding the revenue by undervaluation” ‘.⁵ The ACS began actions under section 214 of the Act to seize imported goods in August 1987.⁶
- 3.4 The ACS raised its investigation with the AGS, which advised the ACS to refer the case to the Commonwealth Director of Public Prosecutions (DPP) for possible action under the Commonwealth *Crimes Act 1914*.⁷ The ACS did so and, while the investigation was still ongoing, received advice from the DPP on several occasions between September 1987 and December 1990.⁸ The DPP ultimately advised the ACS that there was ‘insufficient evidence for a prosecution under the Crimes Act [*sic*]’ but that there was, potentially, ‘sufficient evidence to warrant the commencement of proceedings for offences under the Customs Act [*sic*]’.⁹ The DPP accordingly advised the ACS to refer the case to the AGS for further consideration.¹⁰ The ACS did so and received advice from the AGS that ‘a *prima facie* case existed for offences under the Customs Act [*sic*]’¹¹ in relation to the importations.
- 3.5 Mr Tomson and his business partner Mr Keomalavong were subsequently charged with the following offences under the Act in relation to each of the five importations:
- smuggling goods (section 233);

3 ACS, *Submission 4.2*, Appendix A.

4 ACS, *Submission 4.2*, pp.11-14.

5 ACS, *Submission 4.2*, p.12.

6 ACS, *Submission 4.2*, p.10.

7 ACS, *Submission 4.2*, p.14.

8 ACS, *Submission 4.2*, p.14; Mr Lionel Woodward, *Transcript of Evidence*, 24 July 2003 p.157.

9 ACS, *Submission 4.2*, p.14.

10 ACS, *Submission 4.2*, p.14.

11 ACS, *Submission 4.2*, p.14.

- evading payment of Customs duty payable (section 234);
- making a Customs entry false in a particular (section 234); and
- making a statement untrue in a particular (section 234).¹²

3.6 Each of the offences was alleged to have been committed on the date of the relevant importation.

Chronology of the Proceedings and Result

3.7 Informations (pleadings) for each charge were laid by an ACS officer in relation to each importation, i.e. four separate charges for each importation.¹³ The informations contained the averments that are the subject of this chapter. The informations relating to the Steady Export Co, Gold Vincent & Co, Winelux Enterprise Co, and New Calcutta Store (1969) Ltd importations were laid against Mr Tomson, and the information relating to the Cameron Trading Co importation was laid against Mr Keomalavong as second defendant. The informations commenced the Customs prosecution against both defendants and were laid at the St James Centre Local Court in Sydney on the following dates:

- 16 July 1992 (importation from Steady Export Co);
- 24 July 1992 (importation from Gold Vincent & Co);
- 6, 7, 17 August 1992 (importation from Winelux Enterprise Co);
- 3 September 1992 (importation from New Calcutta Store (1969) Ltd); and
- 3 September 1992 (importation from Cameron Trading Co).¹⁴

3.8 Corresponding summonses were issued to Mr Tomson and the second defendant.

3.9 Three separate sets of hearings were held in 1993, 1994 and 1995 before Magistrate Connors in the Downing Centre Local Court, Sydney. Mr Tomson and the second defendant pleaded not guilty to the charges. The dates of the hearings were as follows:

- 26 – 29 July 1993;

12 ACS, *Submission 4.1*, p.11.

13 ACS, *Submission 4.2*, Appendix A.

14 ACS, *Submission 4.2*, Appendix A.

- 18 – 21 April 1994; and
 - 30 January – 3 February 1995.¹⁵
- 3.10 Magistrate Connors gave judgment in the Sutherland Local Court on 27 June 1995. He found that a reasonable doubt existed in relation to each of the charges and accordingly dismissed the informations laid against the defendants. The Magistrate indicated that his application of the criminal standard of proof (beyond reasonable doubt) was as required by the Act.¹⁶
- 3.11 The defence made an application to the Magistrate for costs which was rejected.¹⁷ Upon appeal to the New South Wales Supreme Court, this ruling was overturned on the basis that the Magistrate made an error in the application of statute.¹⁸ Although the Court referred the matter back to the Magistrate for resolution, the issue of costs was finally settled between the parties in 1998.¹⁹

The Averments

The Nature of the Averments

- 3.12 Each of the informations laid by the ACS in relation to the five importations contained several averments.²⁰ The transcript of the first hearing on 26 July 1993 indicates that the averments were made by the ACS under section 255 of the Act.²¹ Proceedings at the first hearing transpired as follows:
- commencement of hearing and opening of the prosecution case;
 - overview of prosecution case and evidence;
 - initial amendments to averments (see paragraph 3.19 below);

15 ACS, *Submission 4.2*, Appendix B.

16 ACS, *Submission 4.2*, Appendix B.

17 ACS, *Submission 4.2*, Appendix B.

18 ACS, *Submission 4.1*, p.14.

19 *Exhibit 3*, p.11; ACS, *Submission 4.2*, p.24.

20 Most of the averments relating to the New Calcutta Store (1969) Ltd importation were provided to the Committee by the ACS in summons form rather than in the form of informations. See ACS, *Submission 4.2*, Appendix A.

21 ACS, *Submission 4.2*, Appendix B.

- discussion between counsel and Magistrate as to progression of hearing and adjournment;
- tendering and admission of prosecution documentary evidence;
- tendering and admission of investigation evidence;
- discussion between counsel and Magistrate as to progression of examination of investigation evidence; and
- adjournment until following hearing (27 July 1993).²²

3.13 The averments made by the ACS fell into two broad classes: those relating to formal matters, and those relating to more substantial matters.

Formal matters

3.14 A number of the averments related to straightforward formal matters and were included in all of the informations. These were:

- that the ACS officer laying the informations held a position to which the Comptroller-General of Customs had delegated his powers to bring the Customs prosecution;
- that the defendant(s) caused the goods in question to be brought into Sydney from overseas on the relevant date; and
- that the defendant(s) or the customs agent employed by the defendant(s) caused an entry form for home consumption in respect of the relevant goods to be delivered to the ACS, together with an invoice from the relevant overseas firm.²³

3.15 The informations relating to the Gold Vincent & Co, Winelux Enterprise Co, and New Calcutta Store (1969) Ltd importations also contained an averment that Mr Tomson had changed his name to Peter Tomson by instrument in September 1990.²⁴

3.16 Some of the informations also contained averments relating to foreign currency conversion rates.²⁵

22 ACS, *Submission 4.2*, Appendix B.

23 ACS, *Submission 4.2*, Appendix A.

24 ACS, *Submission 4.2*, Appendix A. Mr Tomson's former surname was Vilaysack.

25 ACS, *Submission 4.2*, Appendix A.

- 3.17 The Committee considers that these formal averments were entirely reasonable and appropriate.

Substantial matters

- 3.18 Before outlining the substantial matters that were averred in the informations, the Committee notes that a number of amendments were made to the averments over the course of several hearings from 26 July 1993 onwards.

Amendments to the averments

- 3.19 At the first hearing on 26 July 1993, the prosecution sought the Magistrate's permission to make some amendments to the averments in order to correct typographical errors and omissions.²⁶ No objection to these amendments was raised by the defence and they were accordingly made.²⁷ The relevant amendments are incorporated into the averments as set out below at paragraph 3.22.
- 3.20 At a later hearing on 18 April 1994, the defence submitted to the Magistrate that certain words in the averments amounted to averments of law and were therefore unacceptable under section 255 of the Act.²⁸ At the subsequent hearing on 20 April 1994, the Magistrate noted section 255 and, in agreement with part of the defence submission, determined that the word 'false' in the informations relating to the smuggling charge and the charge of evading Customs duty payable was an averment of law and therefore precluded.²⁹ The Magistrate also agreed with the defence in respect of the word 'duty' and determined that averments made by the ACS in some of the informations regarding Customs duty payable and a Customs duty shortfall were averments of law and must be disregarded.³⁰
- 3.21 Subsequent to this, the prosecution applied to the Magistrate for amendments to be made to the averments determined to be impermissible. The prosecution requested that the word 'false' be

26 ACS, *Submission 4.2*, Appendix B.

27 ACS, *Submission 4.2*, Appendix B.

28 ACS, *Submission 4.2*, Appendix B.

29 ACS, *Submission 4.2*, Appendix B. The Magistrate also determined however that the word 'false' in the informations relating to the charges of making a Customs entry false in a particular and making a statement untrue in a particular (section 234) was an averment of fact and therefore permissible.

30 ACS, *Submission 4.2*, Appendix B.

deleted where required and the word 'incorrect' be substituted.³¹ The Magistrate refused this on the basis that the word 'incorrect' would still constitute an averment of law.³² The Magistrate determined that the word 'false' should be deleted where required.³³ The relevant amendments are incorporated into the averments as set out below.

3.22 The substantial matters averred by the ACS in relation to the charges of smuggling and evading Customs duty payable were:

The Steady Export Co importation

1. that the defendant evaded payment of Customs duty of \$3,406.96 (in the information relating to the charge of evading Customs duty payable);
2. that the entry for home consumption delivered to the ACS stated that the purchase price for the goods was \$A2,462.83, which was lower than the price actually paid;
3. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$A2,462.83, which was lower than the price actually paid;
4. that the defendant caused an export declaration, together with an invoice from Steady Export Co, to be produced to Thailand Customs that specified a purchase price for the goods (\$US1,593.00) which was lower than the price actually paid;
5. that the purchase price for the goods was not less than \$A2,462.83 and US\$1,593.00; and
6. that the only importation from Steady Export Co was that specified in the entry for home consumption.³⁴

The Gold Vincent & Co importation

1. that the entry for home consumption delivered to the ACS stated that the purchase price for the goods was \$A3,266.20, which was lower than the price actually paid;

31 ACS, *Submission 4.2*, Appendix B.

32 ACS, *Submission 4.2*, Appendix B.

33 ACS, *Submission 4.2*, Appendix B.

34 ACS, *Submission 4.2*, Appendix A.

2. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$A3,266.20, which was lower than the price actually paid;
3. that Gold Vincent & Co prepared the invoice at the direction of the defendant and in accordance with the instructions of the defendant;
4. that Gold Vincent & Co, on behalf of the defendant, caused an export declaration to be produced to Hong Kong Customs and Excise that specified a purchase price for the goods of \$HK98,950.00; and
5. that Gold Vincent & Co, on behalf of the defendant, caused an export licence to be produced to Hong Kong Customs and Excise particularising the goods, specifying the manufacturers of the goods, and specifying a purchase price of \$HK98,950.00.³⁵

The Winelux Enterprise Co importation

1. that the defendant evaded payment of Customs duty (in the information relating to the charge of evading Customs duty payable);
2. that the entry for home consumption delivered to the ACS stated that the purchase price for the goods was \$A1,956.00, whereas the price actually paid was not less than A\$8,758.52;
3. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$A1,956.00, whereas the price actually paid was not less than A\$8,758.52;
4. that the entry for home consumption particularised the goods at certain values and that certain of the goods were manufactured and supplied by an overseas individual; and
5. that the defendant caused the Westpac Bank to remit \$A10,000 to the overseas individual in July 1987 and also sent the individual \$A81,000 in payment for goods purchased between December 1986 and September 1987.³⁶

35 ACS, *Submission 4.2*, Appendix A.

36 ACS, *Submission 4.2*, Appendix A.

The New Calcutta Store (1969) Ltd importation

1. that the defendant evaded payment of Customs duty of \$3,916.79 (in the information relating to the charge of evading Customs duty payable);
2. that the entry for home consumption delivered to the ACS stated that the purchase price for the goods was \$A4,442.32, which was lower than the price actually paid;
3. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$A4,442.32, which was lower than the price actually paid;
4. that New Calcutta Store (1969) Ltd prepared the invoice at the direction of the defendant and in accordance with the instructions of the defendant;
5. that New Calcutta Store (1969) Ltd, on behalf of the defendant, caused an export declaration, together with an invoice for the goods, to be produced to Royal Thailand Customs specifying a purchase price for the goods of \$US2,927.00; and
6. that the only importation from New Calcutta Store (1969) Ltd was that specified in the entry for home consumption.³⁷

The Cameron Trading Co importation

1. that the defendant evaded payment of Customs duty of \$14,066.32 (in the information relating to the charge of evading Customs duty payable);
2. that the entry for home consumption and the entry for warehousing delivered to the ACS stated that the purchase price for the goods was the amount nominated, which was lower than the price actually paid;
3. that the invoice delivered to the ACS contained a statement that the purchase price for the goods was \$HK104,070.00, which was lower than the price actually paid;
4. that Cameron Trading Co prepared the invoice at the direction of the defendant and in accordance with the instructions of the defendant;

³⁷ ACS, *Submission 4.2*, Appendix A.

5. that the defendant engaged Cameron Trading Co to produce an export declaration to Hong Kong Customs and Excise on behalf of the defendant's business specifying a purchase price for the goods of \$HK126,620.00;
6. that the defendant engaged Cameron Trading Co to produce an export licence to Hong Kong Customs and Excise on behalf of the defendant's business particularising the goods, specifying the manufacturers of the goods, and specifying a purchase price of \$HK126,620.00; and
7. that the goods particularised in the documents produced to Hong Kong Customs and Excise were the same goods imported into Australia and itemised in the entry for home consumption and the entry for warehousing and in the invoice delivered to the ACS from Cameron Trading Co.³⁸

3.23 In terms of the informations relating to the charges of making a Customs entry false in a particular and making a statement untrue in a particular (section 234), it was averred in the informations relating to the Steady Export Co and Cameron Trading Co importations that the defendant made the false entry and produced documentation to Customs containing the statement untrue in a particular.³⁹ These charges however were not averred in the informations relating to the Gold Vincent & Co and New Calcutta Store (1969) Ltd importations.⁴⁰ In the informations relating to the Winelux Enterprise Co importation, the production of documentation to Customs containing the statement untrue in a particular was averred but not the making of the false entry.⁴¹ Further averments concerning the entries for home consumption and the invoices delivered to the ACS differed from those set out at paragraph 3.22 above in that they stated that the entries and invoices falsely specified the purchase price for the goods.⁴² This was in accordance with the determination of the Magistrate.⁴³

3.24 It is clear that the main thrust of the substantial averments was that the purchase price for the goods specified in the documentation delivered to the ACS was lower than the price actually paid, thereby

38 ACS, *Submission 4.2*, Appendix A.

39 ACS, *Submission 4.2*, Appendix A.

40 ACS, *Submission 4.2*, Appendix A.

41 ACS, *Submission 4.2*, Appendix A.

42 ACS, *Submission 4.2*, Appendix A.

43 See note 29 above.

giving rise to the relevant offence. At the first hearing on 26 July 1993 the prosecution summarised its case as follows:

Mr Tomson in relation to the four shipments that relate to him and Mr Keomalavon [sic] relating to the one shipment that is the subject of his charge, travelled overseas and purchased items of clothing... in Thailand, Hong Kong or Taiwan... The items were paid for in those countries. Thereafter documents were prepared which included invoices which were produced to Australian Customs in due course. In each case the price value disclosed on those invoices which were produced to Australian Customs were said to be done on an FOB basis, on a Free On Board basis and in each case it is the prosecution's case that the figures disclosed were false, they were substantially less than the true value of the goods. ...the documents were effectively prepared by the overseas suppliers the figures being inserted which were false figures, but this was done to the knowledge of Mr Tomson and Mr Keomalavon [sic] and that as a result in each case there has been each of the offences alleged committed.⁴⁴

3.25 After considering the evidence presented by the prosecution, the Magistrate found that the prosecution had established a *prima facie* case in respect of the informations laid against Mr Tomson and the second defendant.⁴⁵

Claims Regarding the Use of the Averments

3.26 Mr Rodda claimed that 'the averments sworn by the Informant were false in material respects and, to that extent, amount to perjured evidence.'⁴⁶ Mr Rodda also stated elsewhere that 'The defence was able to show that the averments were false'.⁴⁷ Mr Rodda further stated that the entirety of the evidence brought before the Magistrate by the prosecution was fabricated.⁴⁸

3.27 Mr Rodda also claimed that the averments:

44 ACS, *Submission 4.2*, Appendix B.

45 ACS, *Submission 4.2*, Appendix B.

46 Mr Rodda, *Submission 1*, p.19.

47 Mr Rodda, *Submission 1*, p.11.

48 Mr Rodda, *Submission 1*, p.19.

...were relied on by the magistrate [*sic*] for the purpose of deciding that there was a *prima facie* case made out against the defendants at the close of the crown case...⁴⁹

3.28 Elsewhere Mr Rodda stated that the averments were:

...the only evidence before the Court that indicated any wrongdoing on the part of the accused.⁵⁰

3.29 Mr Rodda indicated that the formal averments made by the ACS in relation to the identity and status of the ACS officer laying the informations, the carriage of the goods into the country by the defendant, and the delivery of the home consumption entries and invoices to the ACS were not contentious.⁵¹

3.30 In response to Mr Rodda's claim that the averments were false and amount to perjured evidence, the ACS stated that it 'rejects these allegations and considers that they have been made without any proper foundation at all'.⁵² The ACS stated the following in its rejection of the claim:

- no objections were made by either defendant in relation to most of the averments and most of the defendant's submissions on averments were upheld;
- [as a result of the Court stipulating changes to the averments in agreement with the defence's submission] ...any averments in impermissible form were not relied on by the magistrate [*sic*] in determining a *prima facie* case.
- ...the Magistrate found that there was a *prima facie* case or, in other words, evidence which was capable of leading to a conviction. That necessarily means that there was a proper evidentiary basis for commencing a prosecution.
- While Mr Rodda asserts that 'the defence was able to show that the averments were false', in fact the Magistrate's ruling was that Customs had not proved its case beyond reasonable doubt. There is a world of difference between the two points.
- ...the Magistrate was asked to make an order for costs in favour of the defendants on the basis that the prosecution could never have had faith in this case. Indeed, the submission was made that it would be open to the Court

49 Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p.35. See also Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p.36; Mr Ian Rodda, *Transcript of Evidence*, 24 July 2003, pp.111.

50 Mr Rodda, *Submission 1*, p.11. See also Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p.45.

51 Mr Rodda, *Transcript of Evidence*, 24 July 2003, p.128.

52 ACS, *Submission 4.1*, p.12.

to find bad faith. The Magistrate rejected that submission and concluded that there had been no improper or unreasonable conduct in the course of the investigation or the proceedings themselves.⁵³

- 3.31 The ACS also rejected Mr Rodda's claim that the averments were relied on by the Magistrate in deciding that the prosecution had established a *prima facie* case. The ACS stated that this claim is not 'supported by the objective facts',⁵⁴ and that:

It may be noted that no submissions as to whether a *prima facie* case had been made out were made on behalf of Mr Tomson, although he was invited to do so.⁵⁵

- 3.32 The ACS also denied Mr Rodda's claim that the averments constituted the only evidence of wrongdoing.⁵⁶
- 3.33 Thus the main issues for the Committee to consider regarding the use of averments in the case, as raised by Mr Rodda's evidence, are:
- the legitimacy of the averments; and
 - the reliance placed on the averments by the Magistrate in finding that the prosecution had established a *prima facie* case against the defendants. As the focus of the evidence taken by the Committee was on Mr Tomson, the main issue for the Committee to consider here will be the reliance placed on the averments by the Magistrate in finding the *prima facie* case against Mr Tomson.

The legitimacy of the averments

- 3.34 For the Committee, the key question in examining this issue is whether the prosecution brought genuine evidence in support of the averments. This is particularly important given the statement of the ACS, noted in the previous chapter, that averments are not used without an evidential basis.
- 3.35 In considering the legitimacy of the averments, the Committee has had close regard to the following:
- the evidence brought by the prosecution as detailed in the transcripts of the case hearings; and

53 ACS, *Submission 4.1*, pp.13-14.

54 ACS, *Submission 4.2*, p.4.

55 ACS, *Submission 4.1*, p.12.

56 ACS, *Submission 4.1*, p.12.

- the Magistrate's assessment of the prosecution evidence.

3.36 Before setting out its conclusions, the Committee considers it useful to briefly review the prosecution evidence brought in relation to the averred matters. This comprised the documents delivered to the ACS by the defendants, a second set of documents obtained by the ACS overseas, and valuation evidence. The Committee will also review the Magistrate's assessment of this evidence.

The Steady Export Co importation

3.37 At the first hearing, the prosecution indicated its belief that, contrary to the single purchase price for the goods of \$A2,462.83 specified in the Customs documentation delivered to the ACS, Mr Tomson had made two separate payments for the goods – one of \$A2,462.83 and one of \$US1,593.00.⁵⁷ The prosecution gave as supporting evidence two sets of documentation – the documents supplied to the ACS, and a second set of documents from Thailand which, the prosecution stated, showed a separate bank payment for the goods of \$US1,593.00.⁵⁸

3.38 In his submission, Mr Rodda contended that the 'ACS case was false' in this respect.⁵⁹ Mr Rodda stated that one of the documents showing the figure of \$US1,593.00 was a 'Thai foreign exchange control form',⁶⁰ the purpose of which was 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...⁶¹

3.39 The Committee notes that there was another document in the prosecution's evidence, a Thai export invoice, indicating a receipt value of \$US1,593.00.⁶²

3.40 Mr Rodda also stated that \$A2,462.83 was the sole payment for the goods and that the \$US1,593.00 figure referred to:

...the amount left by Tomson in payment for the goods minus the commission and charges retained by Steady Export Co

57 ACS, *Submission 4.2*, Appendix B.

58 ACS, *Submission 4.2*, Appendix B.

59 Mr Rodda, *Submission 1*, p.4.

60 Mr Rodda, *Submission 1*, p.4.

61 Mr Rodda, *Submission 1*, p.34.

62 Mr Rodda, *Submission 1*, Annexure G.

and the freight forwarding company, Trans Air Cargo, as their fees for preparing the export documentation and completing the various other export formalities.⁶³

- 3.41 At a number of hearings the defence brought evidence in relation to the differing amounts and the documentary evidence presented by the prosecution.⁶⁴

The Gold Vincent & Co importation

- 3.42 At the first hearing, the prosecution indicated its belief that the purchase price for the goods of \$A3,266.20 specified in the Customs documentation delivered to the ACS was false, and that the true purchase price was not less than \$HK98,950.00 or \$A18,113.75.⁶⁵ The prosecution gave a range of documentation as supporting evidence including an air waybill and three Hong Kong Customs and Excise export licences.⁶⁶ The prosecution contended that the export licences revealed a combined total purchase price for the goods of not less than \$HK98,950.00 or \$A18,113.75.⁶⁷

- 3.43 In his submission, Mr Rodda stated that the export licences had been applied for in advance of Mr Tomson's buying trip to Hong Kong by his buying agent,⁶⁸ and that the figures in the licences were 'not the actual selling prices of the goods, but the minimum FOB [Free On Board] values acceptable to the Hong Kong Customs.'⁶⁹

- 3.44 At a number of hearings the defence brought evidence in relation to the export licences and the documentary evidence presented by the prosecution.⁷⁰

The Winelux Enterprise Co importation

- 3.45 At the first hearing, the prosecution indicated its belief that the purchase price for the goods specified in the Customs documentation delivered to the ACS was false.⁷¹ The prosecution stated that:

63 Mr Rodda, *Submission 1*, pp.4-5.

64 ACS, *Submission 4.2*, Appendix B.

65 ACS, *Submission 4.2*, Appendix B.

66 ACS, *Submission 4.2*, Appendix B.

67 ACS, *Submission 4.2*, Appendix B.

68 Mr Rodda, *Submission 1*, p.54.

69 Mr Rodda, *Submission 1*, p.56.

70 ACS, *Submission 4.2*, Appendix B.

71 ACS, *Submission 4.2*, Appendix B.

...in relation to this case... there is [sic] no overseas documents so it is not a case where there are local documents to compare with overseas documents. This is a case that is based upon the valuation evidence.⁷²

- 3.46 The valuation evidence is noted below at paragraph 3.57. The prosecution also presented some other documentary evidence indicating the remittance of funds to an overseas individual.⁷³ The prosecution suggested that this individual was involved in the importation.⁷⁴
- 3.47 In his submission, Mr Rodda stated that the lack of any overseas evidence held by the ACS, in combination with a minute paper from the senior ACS representative in Tokyo, 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.⁷⁵
- 3.48 The minute paper from the ACS representative in Tokyo, however, states that the transacting of business in the clothing industry in Taiwan involves very little documentation.⁷⁶
- 3.49 At the hearing on 1 February 1995 the defence brought evidence in relation to the purchase price for the goods.⁷⁷

The New Calcutta Store (1969) Ltd importation

- 3.50 At the first hearing, the prosecution indicated its belief that, contrary to the single purchase price for the goods of \$A4,442.32 specified in the Customs documentation delivered to the ACS, Mr Tomson had made two payments for the goods – one of \$A4,442.32 and one of \$US2,927.00.⁷⁸ The prosecution gave as supporting evidence two sets of documentation – the documents supplied to the ACS, and a second set of documents from Thailand which, the prosecution stated, showed a separate payment for the goods of \$US2,927.00.⁷⁹

72 ACS, *Submission 4.2*, Appendix B.

73 ACS, *Submission 4.2*, Appendix B.

74 ACS, *Submission 4.2*, Appendix B.

75 Mr Rodda, *Submission 1*, p.53.

76 Mr Rodda, *Submission 1*, Annexure 8.

77 ACS, *Submission 4.2*, Appendix B.

78 ACS, *Submission 4.2*, Appendix B.

79 ACS, *Submission 4.2*, Appendix B.

- 3.51 In his submission, Mr Rodda drew a parallel between this importation and the Steady Export Co regarding the separate amounts.⁸⁰ Mr Rodda contended that the \$US2,927.00 figure was not a separate payment for the goods.⁸¹
- 3.52 At the hearings on 31 January 1995 and 1 February 1995, the defence brought evidence in relation to the differing amounts and the documentary evidence presented by the prosecution.⁸²

The Cameron Trading Co importation

- 3.53 At the first hearing, the prosecution indicated its belief that the purchase price for the goods of \$HK104,070.00 or \$A17,961.65 specified in the Customs documentation delivered to the ACS was false, and that the true purchase price was not less than \$HK126,620.00 or \$A21,853.64.⁸³ The prosecution gave a range of documentation as supporting evidence including a Hong Kong Customs and Excise export declaration, an air waybill, and two Hong Kong Customs and Excise export licences.⁸⁴ The prosecution contended that the export licences revealed a combined total purchase price for the goods of not less than \$HK126,620.00.⁸⁵
- 3.54 In his submission, Mr Rodda stated that:
- ...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 [*sic*] 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.⁸⁶
- 3.55 A comparison does reveal discrepancies between the goods listed in the Hong Kong Customs and Excise export declaration and licences and those listed in the Cameron Trading Co invoice, the packing list, and the ACS examination report. There are also, however, discrepancies between the Cameron Trading Co invoice, the packing

80 Mr Rodda, *Submission 1*, p.60.

81 Mr Rodda, *Submission 1*, p.60.

82 ACS, *Submission 4.2*, Appendix B.

83 ACS, *Submission 4.2*, Appendix B.

84 ACS, *Submission 4.2*, Appendix B.

85 ACS, *Submission 4.2*, Appendix B.

86 Mr Rodda, *Submission 1*, p.6 (author's emphasis).

list, and the ACS examination record. The examination record lists goods not registered in the invoice or packing list, and vice versa. All of the documents, with the exception of the export licences, record a total shipment of 37 cartons.

- 3.56 At a number of hearings the defence brought evidence in relation to the documentary evidence presented by the prosecution.⁸⁷

The oral valuation evidence

- 3.57 In addition to the evidence outlined above, at the hearings on 28-29 July 1993 and 18 April 1994 an expert witness for the prosecution, Mr Prelea, gave oral evidence as to the value of representative samples of the imported goods. The values arrived at by Mr Prelea were generally higher than the purchase prices for the goods specified in the Customs documentation delivered to the ACS by the defendants.⁸⁸ At the hearings on 20-21 April 1994 and 30 January 1995 – 1 February 1995, an expert witness for the defence also gave oral evidence as to the value of the goods samples. The values arrived at by this witness differed from those calculated by Mr Prelea and corresponded more to the prices for the goods specified in the Customs documentation delivered to the ACS by the defendants.⁸⁹

The Magistrate's assessment of the evidence

- 3.58 In arriving at his judgment, the Magistrate reviewed the documentary and oral evidence brought by the prosecution.⁹⁰ He also reviewed the documentary and oral evidence brought by the defence.⁹¹
- 3.59 In assessing the probative value of the documentary evidence brought by the prosecution, the Magistrate found that it did not prove beyond a reasonable doubt that the prices for the goods specified in the Customs documentation provided to the ACS by the defendants were false.⁹² Further, the Magistrate stated that:

I am satisfied that the defendants took no part in the preparation of the overseas documents, nor did they submit those documents to the overseas authorities.⁹³

87 ACS, *Submission 4.2*, Appendix B.

88 ACS, *Submission 4.2*, Appendix B.

89 ACS, *Submission 4.2*, Appendix B.

90 ACS, *Submission 4.2*, Appendix B.

91 ACS, *Submission 4.2*, Appendix B.

92 ACS, *Submission 4.2*, Appendix B.

93 ACS, *Submission 4.2*, Appendix B.

- 3.60 In assessing the probative value of the oral valuation evidence given by Mr Prelea, the Magistrate found that the sample of goods examined by him was a representative sample of the importations.⁹⁴ He found that Mr Prelea had expertise in purchasing clothes in the Asian market, but that this expertise and experience was not relevant ‘to the market in which the defendants operated’.⁹⁵ The Magistrate also found that the evidence given by the expert witness for the defence was corroborated by evidence provided by another defence witness.⁹⁶
- 3.61 In the final analysis, the Magistrate found that the evidence given by Mr Prelea did not prove beyond a reasonable doubt that the prices for the goods specified in the Customs documentation provided to the ACS by the defendants were false.⁹⁷ As noted at paragraph 3.10 above, the Magistrate indicated in his judgment that his application of the criminal standard of proof was as required by the Act.

Conclusions

- 3.62 After reviewing the evidence presented in relation to the averred matters, it seems clear to the Committee that the prosecution did not bring genuine evidence, documentary or oral, in support of the averments. For the Committee, the following factors are of particular significance:
- the overseas documentary evidence brought by the prosecution did nothing more, in essence, than indicate different monetary amounts for the imported goods to those indicated in the documentation delivered to the ACS. As noted at paragraph 3.59 above, the Magistrate concluded that the defendants had had no connection with the overseas documents;
 - the overseas documentary evidence failed to prove the prosecution case in relation to any of the charges and so did not bear out the matters stated in the averments; and
 - the oral valuation evidence of Mr Prelea, as recognised by the Magistrate, was irrelevant to the particular nature of the business conducted by the defendants.

94 ACS, *Submission 4.2*, Appendix B.

95 ACS, *Submission 4.2*, Appendix B.

96 ACS, *Submission 4.2*, Appendix B.

97 ACS, *Submission 4.2*, Appendix B.

3.63 Based on its review of the evidence in this chapter, the Committee is drawn to the conclusion that the allegations made in the averments were not supported by the evidence and that the use of the averments was manifestly wrong. If the overseas documents and the valuation obtained by the prosecution were not genuine evidence, then the substantial averments made by the ACS, which were based on this evidence, cannot have had any real legitimacy and should not have been made. Further, the Committee is distinctly unimpressed with the way in which the ACS conducted elements of its case. In particular:

- despite travelling overseas on the DPP's advice and obtaining evidence at public expense, the ACS still made use of the averment provisions in its prosecution. This is precisely the approach which, as indicated in the Committee's first recommendation, the Committee believes should not be taken. The following chronology of the investigation details the overseas travel:

22/2/1988 seizure of goods for entries 1M72680485K (New Calcutta Store); 1M71950432B (Steady Export); 1M72181152K (Winelux) and 1M72110152B (Gold Vincent) in relation to Thongson Imports & Exports.

11/4/1988 meeting held at AGS with Peter Swinton. Swinton advised that due to seriousness of the offences should be dealt with by DPP. On 18/4/1988 DPP agree to take on matter based on preliminary advice.

1/6/1988 DPP advice supporting the gathering of overseas evidential material, after exhausting evidence obtained in Australia. Meeting held with DPP on 18/1/1989 reinforces the importance of obtaining evidence from overseas.

Overseas evidence obtained in Hong Kong & Bangkok by Officers Grausam and Locker during trip between the period 9/2/1989 and 23/2/1989. DPP advice on 24/2/1989 evaluated the need to return overseas to obtain whatever evidence is available in admissible form from Thai Customs and banks, which were not available at the time from the previous trip.

3/8/1989 DPP advise further overseas trip required. Approval granted for Grausam to revisit. Visit occurs between 6/12/1989 and 15/12/1989.

14/8/1990 Prosecution Brief of Evidence forwarded to DPP comprises of 18 lever arch files pertaining to 84 importations.

27/8/1990 section 208A Notices issued with respect to entries 1M72680485K (New Calcutta Store); 1M71950432B (Steady Export); 1M72181152K (Winelux) and 1M72110152B (Gold Vincent) in relation to Thongson Imports & Exports and entry 1M80900482N (Cameron Trading) in relation to Lanwren Pty Ltd/Kongkeo Keomalavong.

11/12/1990 DPP legal advice located at folios 245-258 of file N88/07987 Part 2 advises insufficient evidence to proceed under s29D 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.

10/1/1991 Prosecution Brief referred to AGS.

Acknowledgment received 23/9/1991 and 14/10/1991 that AGS Lyn Brady has carriage of matter.⁹⁸

- a number of the substantial averments initially contained phrasing which meant that they were averments of law. These averments then had to be amended in order to render them admissible. Such amendments should not have had to be made – the averments should have been correctly framed from the beginning.
- the ACS did not call all of the witnesses indicated on its witness list for the hearings.⁹⁹

3.64 When combined with the lack of genuine evidence brought by the ACS and the way in which the averments were used, these elements present the Committee with a clear picture of substandard practice and procedure on the part of the ACS at that time. For the Committee, this confirms the need for many of the recommendations set out in the previous chapter.

Reliance on the averments

3.65 The Committee's conclusion regarding the averments brings the question of reliance into relief. As noted at paragraph 3.25 above, the Magistrate found that the prosecution had established a *prima facie* case in respect of the informations laid against the defendants.¹⁰⁰ Also, as noted at paragraph 3.33 above, the focus of the evidence taken by

98 *Exhibit 6*, pp.2-3. *Exhibit 6* is at Appendix D.

99 Mr Rodda, *Transcript of Evidence*, 23 June 2003, pp.39-40; *Exhibit 1*, p.2.

100 ACS, *Submission 4.2*, Appendix B.

the Committee was on Mr Tomson. Consequently, the main issue for the Committee to consider will be the reliance placed on the averments by the Magistrate in finding the *prima facie* case against Mr Tomson.

- 3.66 In considering this issue, the Committee has had close regard to the Magistrate's finding of a *prima facie* case against Mr Tomson as detailed in the transcript of the case hearing on 20 April 1994.
- 3.67 In terms of the charges against Mr Tomson, the Magistrate stated that:
- BENCH: Not formerly held a prima facie case against the defendant Tomson for all the matters before the Court, on the evidence contained in the documents and the evidence from.. (not transcribable).. I in fact do so.¹⁰¹
- 3.68 Notwithstanding the second set of evidence, which cannot be identified due to the gap in the transcription of the judgment, it is apparent to the Committee that the documents referred to by the Magistrate included the averments. The averments, therefore, were relied upon by the Magistrate in finding the existence of a *prima facie* case against Mr Tomson.
- 3.69 This being the case, it is open to the Committee to conclude that, without the averments, the Magistrate may not have found a *prima facie* case against Mr Tomson.
- 3.70 The Committee notes that the ACS requested and obtained an opinion from the Acting Commonwealth Solicitor-General to the effect that the averments were not the significant factor in the establishment of the prosecution's case. The Committee considers however that the evidence suggests otherwise.

The role of the DPP

- 3.71 As cited above at paragraph 3.63, the DPP informed the ACS in 1990 that there was 'insufficient evidence'¹⁰² to prosecute the case under the *Crimes Act 1914*, advising instead that the brief be referred to the AGS for prosecution under the *Customs Act 1901* '**whereby the averment provisions can be advantaged**'.¹⁰³

101 ACS, *Submission 4.2*, Appendix B.

102 ACS, *Submission 4.2*, p.14; *Exhibit 6*, p.3.

103 *Exhibit 6*, p.3.

3.72 The Committee was not provided with a copy of the then DPP's advice by the ACS, and the current DPP declined to provide a copy of the advice to the Committee. However, correspondence from the current DPP disclosed the nature of the advice:

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 [sic] or the referral to AGS for proceedings under the Customs Act [sic]. 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 [sic], the DPP stated that there may be sufficient evidence to warrant commencement of proceedings for offences under the Customs Act [sic], 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 [sic]. The advice stated that as Customs Act [sic] proceedings are handled by the AGS, we were not advising on the sufficiency of evidence in relation to any possible Customs Act [sic] prosecution.

The advice noted that in proceedings pursuant to the Customs Act [sic] the prosecution can take advantage of the averment provisions in section 255 of the Customs Act [sic] 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

[sic] offences were traditionally perceived as civil or at least quasi criminal in nature and hence handled by the AGS.¹⁰⁴

- 3.73 The Committee is concerned that evidence which was adjudged insufficient by the DPP in 1990 to commence a prosecution under the *Crimes Act 1914* to the criminal standard of proof was subsequently used to commence a prosecution under the *Customs Act 1901* to the very same standard. Under sections 245 – 248 of the *Customs Act 1901*,¹⁰⁵ the criminal standard of proof applies in prosecutions in the lower courts; this, as the Magistrate indicated in his judgment, was the standard that applied in the prosecution of Mr Tomson.¹⁰⁶
- 3.74 Given this, the Committee cannot help but conclude that the advice given to the ACS by the DPP in 1990 was a falsely-based option, for the evidence was eventually used for a prosecution to the same standard of proof as that under the *Crimes Act 1914*.¹⁰⁷ Furthermore, if the ACS knew that its evidence was not sufficient for a criminal prosecution under the *Crimes Act 1914*, it should not have used that same evidence to commence a prosecution under the *Customs Act 1901* to the criminal standard of proof. This is especially so given that the ACS, as the agency responsible for the administration of the *Customs Act 1901*, must have known that the criminal standard of proof would apply to its prosecution of Mr Tomson. The ACS can only have hoped to have succeeded if it believed that the averments were not going to be challenged. In the view of the Committee, this constitutes an abuse of the averment provision (section 255), because the ACS knew its evidence was not sufficient to satisfy the criminal standard.

Final Comments

The Time Period

- 3.75 The Committee considers it necessary to comment on the time interval between the first seizure of the imported goods in August 1987 and the final resolution of the costs issue between the parties in mid-1998 – a total period of almost eleven years.

104 DPP, correspondence of 15 April 2004. This correspondence is at Appendix E.

105 See paragraphs 2.74 – 2.77 above.

106 See paragraphs 3.10 and 3.61 above.

107 The Committee recognises that the current DPP was not in office in 1990.

- 3.76 Firstly, there was an interval of some five years between the 1987 seizure and the laying of the first information in July 1992. Although this was within the five-year statutory period allowed by Parliament, the Committee is unimpressed that the ACS prolonged commencement of the prosecution to the very limit of what was possible. It is clear that, during this period, the ACS did not collect evidence in a timely fashion¹⁰⁸ and indeed had been collecting evidence since 1987-1988. In the interests of procedural fairness, a much shorter interval should have elapsed between the seizures and the commencement of the prosecution. Secondly, there was a period of some six years between the institution of the case in 1992 and the final resolution of the costs issue in 1998. Notwithstanding that part of the timeline set by court scheduling, the Committee considers that this period was unacceptably long. The ACS should have done more to expedite the matter, particularly in the costs resolution phase following the decision of the New South Wales Supreme Court.
- 3.77 The gross dilatoriness displayed by the ACS over the course of the investigation and prosecution – almost 11 years – is not the Committee’s idea of justice. Nor is it the Committee’s idea of justice that the ACS instituted a prosecution to the criminal standard of proof on an evidential foundation that it knew, on advice from the DPP, to be insufficient to satisfy that standard under another Act where averments were not available. On the evidence, Mr Tomson suffered considerable pecuniary loss as a result of the investigation and prosecution and was indeed bankrupt by 1999.¹⁰⁹ The Committee believes that compensation for Mr Tomson is therefore appropriate and would go some way to repair the loss he has sustained.

The Midford Paramount Culture

- 3.78 The Committee also notes that the first stages of the ACS’s investigation into the importations by the defendants took place at the same time as the ACS was investigating importations conducted by Midford Paramount Pty Ltd. Some of the ACS officers involved in the *Tomson* case gave evidence to the subsequent Joint Committee of

¹⁰⁸ See paragraph 3.63 above and Appendix D.

¹⁰⁹ Mr Rodda, *Submission 1*, p.11; Mr Ian Rodda, *Transcript of Evidence*, 23 June 2003, p. 47; Mr Lionel Woodward, *Transcript of Evidence*, 24 July 2003, p.177.

Public Accounts (JCPA) inquiry into the Midford Paramount matter.¹¹⁰ In its inquiry report, the JCPA stated that:

Evidence was received that within the Investigations arena, ACS officers displayed and frequently voiced the attitude that all importers are crooks, and it is just a matter of catching them and that 'fraud is endemic' in the clothing industry. It appears, however, that the audits conducted by Customs have not shown this to be true.¹¹¹

3.79 The report of the JCPA made a total of 134 recommendations, including a number of recommendations for improving the performance of its investigation workforce and the culture of the ACS. In November 1993 the Government announced that it accepted the 'overwhelming majority' of the 134 recommendations made by the JCPA and that it was proceeding to implementation.¹¹²

3.80 The ACS indicated to the Committee that it has undergone considerable cultural and organisational change over the past 10 years:

The Tomson matter is an old Customs investigation and prosecution case that was finalised through court proceedings. The investigation was carried out prior to changes implemented by a new administration following the Review of the Australian Customs Service. The Tomson case predates significant legislative and administrative changes to Customs processes.

The search and seizure provisions within the Customs Act [sic] were overhauled in 1995.

The *Prosecution Policy of the Commonwealth* established those factors that an agency must consider before launching legal proceedings. Customs complies fully with this policy.

The organisational culture of the Australian Customs Service has undergone significant change over the last 10 years.

110 Mr Rodda, *Submission 1.5*, pp.1-2. See also the Joint Committee of Public Accounts (JCPA), *Report 325: The Midford Paramount Case and Related Matters, Customs and Midford Shirts – The Paramount Case of a Failure of Customs*, AGPS, Canberra, Appendix A.

111 JCPA, *Report 325: The Midford Paramount Case and Related Matters, Customs and Midford Shirts – The Paramount Case of a Failure of Customs*, AGPS, Canberra, pp.473-474.

112 Press release by Senator Chris Schacht, then Minister for Science and Small Business, 10 November 1993.

In September 2003, Customs won the Prime Minister's gold award for Excellence in Public Sector Administration.¹¹³

3.81 The ACS further detailed the overhaul of the search and seizure provisions in the Act:

The *Customs Act 1901* was amended in 1995 (*Customs, Excise and Bounty Legislation Amendment Act 1995*). A principal feature of the amendments included a substantial rewriting of the search and seizure provisions within the Act. Search provisions were amended to bring them into line with the prevailing policy on the use of search warrants by Commonwealth officers (*Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*).

The amendments established a search and seizure regime that was subject to judicial oversight. Under the legislation, a judicial officer must have regard to the appropriateness and necessity of the warrant action before issuing a warrant to Customs. The amendments also introduced time frames for the retention of evidential material seized under warrant. The Act now states that Customs must return evidential material seized under warrant if:

- the reason for the seizure no longer exists; or
- Customs decides that the material is not to be used as evidence; or
- within 120 days after seizure, Customs has not commenced proceedings in which the material was to be used, and a judicial officer has not made an order for the further retention of the material within that time.

Customs prosecutions must be commenced at any time within 5 years from the date of the offence.¹¹⁴

3.82 The Committee accepts the above statements of the ACS and acknowledges that it has undergone important organisational changes over the past decade. However, it is clear to the Committee that the culture which produced the Midford Paramount prosecution also produced the *Tomson* prosecution. The *Tomson* case is unfinished business from the Midford period and must be dealt with on a similar basis.

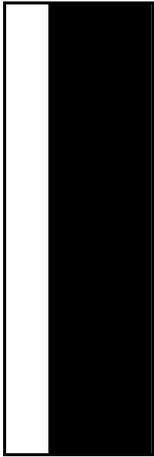
113 ACS, *Submission 4.6*, p.9.

114 ACS, *Submission 4.5*, p.2.

Recommendation 6

- 3.83 Given the reprehensible handling exhibited by the Australian Customs Service over the course of the investigation and failed prosecution of Mr Tomson, the Committee recommends that Mr Tomson receive appropriate compensation for commercial losses directly attributable to the seizure of the goods and to the lapse of time before the resolution of the costs issue between the parties in 1998.**

Hon Bronwyn Bishop MP
Chairman
May 2004



Dissenting Report—Hon Duncan Kerr MP

I have the misfortune to dissent from the Committee's recommendation in relation to payment of compensation.

I believe the evidence received by the Committee would have justified our Committee finding that, in light of the matters put to us by and on behalf of Mr Tomson, the issue of whether an ex gratia payment should be made to him ought now receive careful and independent examination.

However, our conclusions go further and make firm judgments as to that matter.

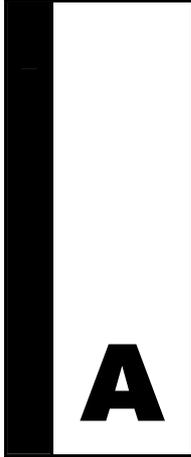
Our terms of reference and our processes were not directed to that specific issue.

Because I have residual doubt that I possess all material facts, and whether I am well placed to draw such firm conclusions even from what I understand to be the facts, I believe I am not in a position to properly judge the final merits.

In lieu of the Committee's final conclusion I would recommend that there be an independent assessment of the case for payment of compensation to Mr Tomson to be conducted against the criteria applied generally to determine eligibility for Commonwealth ex gratia payments.

Recommendation

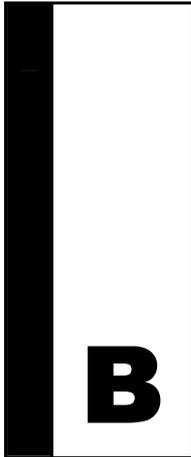
The dissenting Committee member recommends that there be an independent assessment of the case for payment of compensation to Mr Tomson to be conducted against the criteria applied generally to determine eligibility for Commonwealth ex gratia payments.



Appendix A – List of Submissions

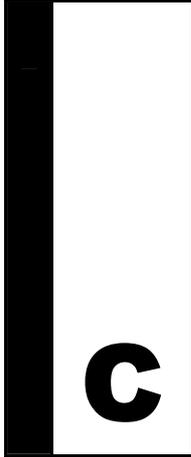
Submission	Individual/Organisation
1	Mr Ian Rodda
1.1	Mr Ian Rodda (Supplementary)
1.2	Mr Ian Rodda (Supplementary)
1.3	Mr Ian Rodda (Supplementary)
1.4	Mr Ian Rodda (Supplementary)
1.5	Mr Ian Rodda (Supplementary)
1.6	Mr Ian Rodda (Supplementary)
1.7	Mr Ian Rodda (Supplementary)
1.8	Mr Ian Rodda (Supplementary)
1.9	Mr Ian Rodda (Supplementary)
1.10	Mr Ian Rodda (Supplementary)
2	Customs Brokers & Forwarders Council of Australia Inc.
3	Customs and International Transactions Committee, Business Law Section, Law Council of Australia
3.1	Customs and International Transactions Committee, Business Law Section, Law Council of Australia (Supplementary)

- 3.2 Customs and International Transactions Committee,
Business Law Section, Law Council of Australia
(Supplementary)
- 4 Australian Customs Service
- 4.1 Australian Customs Service (Supplementary)
- 4.2 Australian Customs Service (Supplementary)
- 4.3 Australian Customs Service (Supplementary)
- 4.4 Confidential
- 4.5 Australian Customs Service (Supplementary)
- 4.6 Australian Customs Service (confidential except for
extract of five dot points from page 9 which were
authorised for publication)
- 5 Attorney-General's Department
- 6 Mr Noel Balzary
- 7 Mr Reg Benson
- 7.1 Mr Reg Benson (Supplementary)
- 7.2 Mr Reg Benson (Supplementary)



Appendix B – List of Exhibits

- 1 Mr Ian Rodda
 ‘Brief Head - Case 1: Comptroller General of Customs v Tomson
 FNA Vilaysack’.
- 2 Mr J H Jeffery
 ‘Correspondence between the ACS, Senator Ellison's Office and
 60 minutes regarding the Peter Tomson case’.
- 3 Mr J H Jeffery
 ‘A report commissioned by the ACS into allegations made
 against ACS officers concerning the prosecution of Mr Peter
 Tomson’.
- 4 CONFIDENTIAL
- 5 Mr J H Jeffery
 ‘Minute dated 2 February 1988 to the Director, Investigation
 from P.R Paraggio, Chief Inspector, Operations 1, Investigation.
 Subject: Paul Vilaysack and Lee Vilaysack trading as Thongson
 Imports and Exports’.
- 6 Mr J H Jeffery
 ‘Customs NSW Minute relating to the Peter Tomson case, dated
 8 May 1997’.



Appendix C – List of Witnesses

Monday, 23 June 2003, Canberra

Individuals

Mr Ian Rodda, Director, Rodda Castle & Co Pty Ltd

Mr Ken Tomson

Mr Peter Tomson

Australian Customs Service

Mrs Marion Grant, National Director, Border Compliance and Enforcement

Mr Lionel Woodward, Chief Executive Officer

Australian Government Solicitor

Mr Simon Daley, Senior Executive Lawyer

Mr Stephen Vorreiter, Senior Executive Lawyer

Law Council of Australia

Mr Andrew Hudson, Immediate Past Chair, Customs and International Transactions Committee

Mr John Law, Chair, Customs and International Transactions Committee

Thursday, 24 July 2003, Sydney

Individuals

Mr Noel Balzary

Mr Ian Rodda, Director, Rodda Castle & Co Pty Ltd

Mr Ken Tomson

Mr Peter Tomson

Australian Customs Service

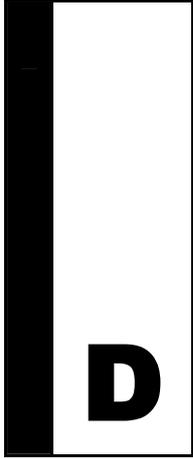
Mrs Marion Grant, National Director, Border Compliance and Enforcement

Mr Lionel Woodward, Chief Executive Officer

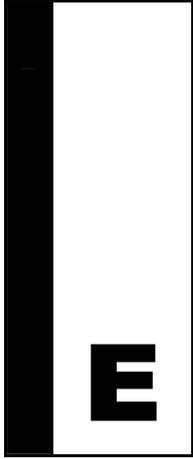
Australian Government Solicitor

Mr Simon Daley, Senior Executive Lawyer

Mr Stephen Vorreiter, Senior Executive Lawyer



Appendix D – Exhibit 6



Appendix E – Correspondence from the Director of Public Prosecutions