

Ref No:

2 May 2003

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

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- 3 MAY 2003

BY:.....



**CBFCA**

A U S T R A L I A

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Dear Ms Gould

Thank you for your letter of 4 April 2003 and for providing an opportunity for the Customs Brokers & Forwarders Council of Australia Inc. (CBFCA) to make a submission to the *Inquiry into the Averment Provisions in Australian Customs Legislation* (the Inquiry) to be conducted by the House of Representatives, Standing Committee on Legal and Constitutional Affairs.

In the main, the CBFCA would see in depth comments of the averment provisions in the Customs Act 1901 (the Act) as being the province of the legal profession, however the CBFCA through its members has been involved in prosecutions undertaken by the Australian Customs Service (Customs) and has an awareness of the implications of the use of averments. As such it sees that it has appropriate knowledge to provide comment. In addition, these issues have been discussed in the past by the CBFCA with representatives of the Law Council of Australia.

### Background

The CBFCA notes the provisions of Section 255 of the Act as it relates to the making of averments in the initiation of a prosecution and as to the fact(s) contained therein being *prima facie* evidence of the matter to which the averment relates. Averments have been the subject of various regulatory reviews in the past and the CBFCA notes the comments of the Australian Law Reform Commission (ALRC) in its Report No. 60, *Customs and Excise*, and sees the issues raised at Clause 487 of that Report as going to the heart of the use by Customs of averments.

As to the issues of evidence in prosecutions, the ALRC Report No. 26 *Evidence* provides appropriate commentary on:

- standards as they relate to evidence
- the need for the prosecution to support any case, and
- for procedures as they relate to evidence not to disadvantage the defendant.

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## **Customs Prosecutions - Civil or Criminal Liability**

As to customs regulatory provisions (as they relate the prosecutions requiring a civil or criminal standard), the CBFCA in relation to the Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2000 provided commentary to the Senate Legal and Constitutional Legislation Committee on the strict liability provisions of the legislation and Infringement Notice Guidelines and the impact of criminal liability. As to this Inquiry, the issue is again raised as the result of the differing positions between State's Courts as to whether customs prosecutions are of a civil or criminal nature and in determining that position, the appropriate standard of proof.

Differences having arisen from decisions in the New South Wales Court of Appeal, the Federal Court and the Queensland Supreme Court of Appeal where it has been held that customs prosecutions are of a criminal nature and that a criminal standard of proof applies, this however must be adjudged as against a divergent view from the Victorian Supreme Court.

The issue as to civil or criminal liability on customs prosecutions was most recently raised in *Labrador Liquor*<sup>1</sup> which is currently being appealed to the High Court. Suffice to say that the judgements in the various Courts, whether as to a customs prosecution being of civil or criminal liability already takes note of the fact that customs prosecutions are matters with serious consequence from pecuniary or sentencing outcomes. As the result of these serious outcomes the use of averments requires consideration due to potential disadvantage to the defendant.

Whether civil or criminal, the CBFCA sees it is inappropriate that the averment arrangement be available in such prosecutions. The *Labrador Liquor* case and other judgements have examined and commented upon the potential misuse of averments. In addition there are a significant number of cases and legal texts which address the appropriateness of Customs use of averments.<sup>2</sup>

As previously stated the CBFCA sees that the legal profession is in a more appropriate position to provide a finite comment on averments, however the CBFCA from its understanding of the use or misuse of averments would suggest that the averment process should not be retained in customs prosecutions and finds support on its position in ALRC commentaries.

However should it be seen that the averment process be retained then specific guidelines as to the averment process should be introduced / enforced and the guidelines should provide specific censure / ramifications for those who choose to abuse the process in the making of averments without the appropriate grounds to support any evidentiary arrangements.

Should averment be maintained then the CBFCA sees merit in the format for retention noted in the ALRC Report 95.<sup>3</sup>

Kind regards



**STEPHEN J MORRIS**  
**Executive Director**

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<sup>1</sup> CEO of Customs v Labrador Liquor Wholesalers Pty Ltd B46 of 2002, 11 December 2002

<sup>2</sup> B J Cooper, 1984, Customs and Excise Law, P341-345, and H.N.P. Walliston, 1904, Customs Law and Regulations, P169

<sup>3</sup> Principled Regulation, Australian Law Reform Commission Report 95, December 2002, Recommendation 13-2, P37