Inquiry into averment provisions in Australian Customs legislation

Tabling Statement

1. On behalf of the Standing Committee on Legal and Constitutional Affairs, I present the Committee's report entitled *Modern-day usage of averments in customs prosecutions*, together with the minutes of proceedings.

2. On 27 March 2003 the Committee resolved to conduct an inquiry into averment provisions in Australian Customs legislation. This followed the Committee's review of the Australian Customs Service *Annual Report 2001-02*. The inquiry focused specifically on the averment provisions in the *Customs Act 1901* and considered cases involving the use of these provisions.

3. Under the Act, averments function as an evidentiary aid for the Australian Customs Service in Customs prosecutions, and, as such, they relate to fundamental issues of procedural fairness and equity in court proceedings. The use of averments has attracted considerable debate, not only in relation to Customs prosecutions but also more generally.

4. A key question for the Committee was the appropriateness of the averment provisions in the Act – a question that encompasses complex issues such as the difficulties in obtaining evidence and the potential for averments to be misused. Evidence received by the Committee revealed both

the value of averments and undesirable consequences that can result from their use. There are a number of circumstances where the employment of averments will be reasonable and appropriate – for example in establishing formal and non-controversial matters which could otherwise take up an excessive amount of court time.

5. At the same time, however, the use of averments can have adverse effects, such as leaving defendants with a diminished capacity to rebut matters averred by the prosecution. In order to reduce the potential for such situations to arise, the Committee has proposed some comprehensive amendments to the *Customs Act* including:

   - A mechanism conferring discretion on courts to disallow averments at the pre-trial stage on the basis of injustice to the defendant; and
   - The insertion of guidelines on the appropriate use of averments into the Act Regulations.

6. The Committee has also recommended that the Act be amended to prevent the use of averments as a substitute for evidence obtained for a Customs prosecution, and that the Customs Service continue to send briefs of evidence compiled for possible prosecutions to the Australian Government Solicitor for independent assessment and advice.

7. The Committee has also taken note of the recent High Court decision in *Chief Executive Officer of Customs v Labrador Liquor*

Wholesale Pty Ltd & Ors. Prior to this case there was some uncertainty where prosecutions were commenced in higher courts regarding the appropriate standard of proof to be applied in Customs prosecutions. In the lower courts the criminal standard has applied. The High Court has now indicated that the appropriate standard of proof to be applied in all cases is the criminal standard (beyond reasonable doubt), and the Committee has recommended that this important clarification be codified in the *Customs Act*.

8. Along with the issue of the appropriateness of the averment provisions, the Committee has investigated the use of averments in a particular Customs prosecution, namely *Comptroller-General of Customs v Tomson and Keomalavong*. The Committee received a great deal of evidence in relation to this case, which was brought by the Australian Customs Service in 1992 in relation to a number of importations of clothing goods made by the defendants in the late 1980s which were subject to seizure. The case was lost by the Customs Service but the matter was not finalised until 1998 – eleven years in total from 1987 to 1998.

9. Of great concern to the Committee was evidence provided to the Committee by the Australian Customs Service which showed that, even though the evidence gathered for the case had been considered in 1990 by the then Commonwealth Director of Public Prosecutions as not being sufficient to support a prosecution under the *Crimes Act*, the Customs

Service still proceeded to institute a Customs prosecution in the Magistrate's Court requiring the same standard of proof as that required under the *Crimes Act* – namely the criminal standard of beyond reasonable doubt. This meant that they hoped to rely on the averments to gain a conviction. Facts which were averred in the Magistrate's Court stood as *prima facie* evidence – yet the Customs Service could not prove its case to the criminal standard as required with the evidence it brought, as it would have known prior to commencing the prosecution. I quote from the Customs Service Minute relating to this case dated 8 May 1990:

> 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.

As the agency responsible for the administration of the *Customs Act*, the Customs Service must have known that the criminal standard of proof would apply to its prosecution of Mr Tomson.

10. It was cynical in the extreme of the Australian Customs Service, having travelled overseas in February and December 1989 at public expense to gain evidence against Mr Tomson, to prosecute Mr Tomson in 1992 and still rely on averments

when they had been told by the Director of Public Prosecutions in 1990 that there was not sufficient evidence to meet the criminal standard of proof. This shows an abuse of the averment provisions in the *Customs Act*.

11. The Committee has also found it necessary to strongly criticise the amount of time that elapsed over the course of the investigation and prosecution of Mr Tomson – some 11 years in total. It is not the Committee's idea of justice that an investigation and prosecution conducted by the Australian Customs Service should have run over such a protracted period. On the evidence, Mr Tomson suffered considerable pecuniary loss as a result of the case and was indeed bankrupt by 1999.

12. It became apparent to the Committee over the course of its inquiry that the Customs Service culture that produced the *Tomson* case had also produced the Midford Paramount matter which was investigated by the Joint Committee of Public Accounts in the early 1990s. That Committee, of which I was a part, recommended compensation be paid, and the then Government indeed paid this compensation. The Australian Customs Service indicated to the Committee that it has undergone considerable organisational and cultural change over the past decade, and the Committee accepts this. It is true that the organisational culture of the Customs Service is not the same today as it was then. However, it is equally clear to the Committee that the *Tomson* case is unfinished

business from the Midford Paramount period and needs to be dealt with on a similar basis.

13. Given the reprehensible handling of this case by the Australian Customs Service, the Committee has recommended that compensation for Mr Tomson be paid. The Committee recognises that any compensation would be nowhere near the magnitude of the Midford compensation paid. I note that the Honourable Member for Denison, in his words, has 'the misfortune to dissent from the Committee's recommendation in relation to payment of compensation'. I further note that the Honourable Member for Denison was a member of the government during the period that the *Tomson* case was before the court, although as Minister for Justice he did not have responsibility for Customs.

14. In conclusion, the Committee is hopeful that, in the context of Customs prosecutions at least, the recommendations in this report will contribute towards improved prosecution practice and the continual refinement of the law as it relates to evidence and court procedure. I commend the report to the House.