

## Submission 3.1



Via email: [laca.reps@aph.gov.au](mailto:laca.reps@aph.gov.au)

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

Dear Ms Gould,

### **Inquiry into the Averment Provisions in Australian Customs Legislation Impact of the decision in Labrador Liquor**

I refer to my letter dated 8 May 2003 to the House of Representatives Standing Committee on Legal and Constitutional Affairs', ('the Standing Committee'), inquiry into the Averment Provisions in Australian Customs Legislation.

Please note that these comments have been endorsed by the Business Law Section but have not been endorsed by the Council of the Law Council of Australia.

#### **Background**

As you would be aware, the Standing Committee received a submission ('Submission') from the Customs and International Transaction Committee of the Business Law Section of the Law Council of Australia, ('the Committee'). Members of the Committee also appeared before the Standing Committee on 23 June 2003 to provide additional information and answer questions of the Standing Committee.

I understand that subsequent hearings of the Standing Committee took place on 24 July 2003.

#### **Judgement in the Labrador Liquor Case**

The purpose of this letter is to provide the Standing Committee with additional information regarding the High Court decision in *CEO of Customs v Labrador Liquor Wholesale Pty Ltd and others [2003] HCA 49*, the judgment in which was handed down on 5 September 2003 ('*Labrador Liquor Case*') and its implications for the use of Averments in Australian Customs Legislation.

In the Committee's Submission and during oral evidence to the Standing Committee, there was significant discussion on the unsatisfactory state of the law regarding the nature of Customs and Excise prosecutions, particularly the standard of proof to be satisfied by a prosecuting authority in

such Customs and Excise prosecutions. As the Standing Committee would be aware, pursuant to Section 255 of the Customs Act 1901 ('Act') and Section 144 of the Excise Act 1901 Averments are available to a prosecuting authority in Customs and Excise prosecutions.

For these purposes, it is important to note that the majority of the allegations against the respondents in the *Labrador Liquor Case* were based on Averments. As Justice Hayne observed at paragraph 142 of the unreported judgment:

*"Indeed, in the present matter, the whole of the Customs' amended statement of claim as set out beneath the introductory words that pursuant to Section 255 of the Customs Act and Section 144 of the Excise Act 'the plaintiff says and avers and it is the fact that, '(Whether reliance on the Averment provisions in this way is open to Customs in this case is a question which was not argued and about which I should express no view)"*

### **Reasoning in the Labrador Liquor Case**

By way of summary, there were three main issues before the High Court on appeal from the Queensland Supreme Court of Appeal. Ultimately, the High Court held as follows.

1. To obtain a conviction of a defendant in Customs Prosecutions, the elements of the offence must be established beyond reasonable doubt
2. To obtain a conviction of a defendant in any Excise prosecutions, the elements of the offence must be established beyond reasonable doubt.
3. Customs and Excise prosecutions are not criminal proceedings for the purposes of the *Queensland Evidence Act 1977*.

### **Impact of the Labrador Liquor Case on the Inquiry on use of Averments**

It is respectfully suggested that the decision of the High Court has two significant impacts on the Inquiry before the Standing Committee.

1. The High Court has finally clarified that the standard of proof in Customs (and Excise) prosecutions is proof beyond reasonable doubt. This conclusion resolves the uncertainty in decisions of various State Supreme Courts and the Federal Court. The decision was based on a proper characterisation of the nature of the relevant offences leading to prosecution and the seriousness of those offences. As stated by Justice Hayne at paragraph 144 of the unreported judgment:

*"Seeking to obtain the conviction of a person accused of contravening written or unwritten law lies at the heart of the criminal process. The fact of conviction is an important criterion for the operation of constitutional provisions and the operation of federal and State legislation. Absent statutory provisions for the contrary, a conviction should not be recorded except where the requisite elements of the contravening conduct are established beyond reasonable doubt"*

The High Court subsequently found no such statutory provisions which would override the normal rules for establishing the standard of proof in these matters. Accordingly, the High Court reached a conclusion that the standard of proof should be proof beyond reasonable doubt.

It is the view of the Committee that given this characterisation of the nature of the offences, it is inappropriate that Averments should apply in such proceedings. Even if the Act does allow their use, given the nature of the offences and the powers of prosecuting authorities to secure appropriate evidence it appears inappropriate to allow them to merely proceed by way of Averments.

2. The High Court's comments were to the effect that the ability to use Averments did not disturb the conclusion that the standard of proof was beyond reasonable doubt.

In reaching that conclusion, the High Court made a number of observations regarding Averments. Included in those comments is the comment of Justice Hayne at page 51 of the unreported judgment:

*"No matter what standard of proof is adopted, the averment provisions may, in certain circumstances, confront the Judge with the difficulty of resolving a competition between the requirement of the averment provisions that, as a matter of law, certain facts may, but need not, be taken to have been established to the requisite standard, and evidence tendered in contradiction of that conclusion. No matter what the standard of proof, the Judge can resolve the competition in favour of the party making an averment only if persuaded of the existence or occurrence of the fact of averred."*

Accordingly, at the very least, it is unlikely that Averments would, on their own support a successful prosecution. For this reason, it is the view of the Committee that reliance on Averments, alone, should not be adequate to support the issue of proceedings by a prosecuting authority, as averments alone will rarely discharge the requisite standard of proof especially if a defendant produces rebuttal evidence.

## **Conclusion**

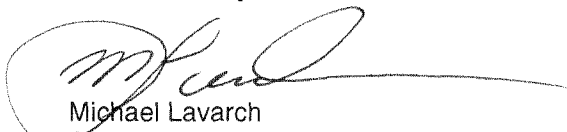
Based on the comments in the *Labrador Liquor Case* and comments in earlier submission, the Committee would now make the following conclusions.

1. The Committee believes the findings of the High Court further support the previous comments of the Committee in its Submission that it is inappropriate to permit the use of Averments in Customs and Excise Prosecutions and the relevant Averment provisions should be removed.
2. Even if Averments are to remain (subject to alteration to their uses set out in our earlier Submission and the comments in ALRC Report No. 90), 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 (such as in the *Labrador Liquor Case*). This would permit a Court to disallow such Averments and dismiss proceedings relying totally or substantially on Averments. It is unfair to submit a defendant to such prosecution with all the associated allegations and expenses if the prosecuting authority has no evidence beyond Averments.

The Committee looks forward to the opportunity to discuss these matters in detail before the Standing Committee.

The Committee would be grateful if you would provide an update as to the current status of the Inquiry and the future conduct of the Inquiry.

Yours sincerely



Michael Lavarch  
Secretary-General

10 November 2003