

## **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.<sup>1</sup>

- 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.<sup>2</sup>

- 2.7 The ACS added that it is 'extremely rare'<sup>3</sup> 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.<sup>4</sup> 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'.<sup>5</sup>

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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.<sup>6</sup> 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.<sup>7</sup>

- 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.<sup>8</sup> The CITC noted the ALRC's conclusion, in ALRC 60, that averments are capable of abuse,<sup>9</sup> and drew the Committee's attention to the cases of *Narelle Maree Walsh, Delegate of the Chief Executive Officer of Customs v Allegretta & Anor*,<sup>10</sup> and *Chief Executive Officer of Customs v Alex*

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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*.<sup>11</sup> 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.<sup>12</sup>

- 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.<sup>13</sup>

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

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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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup>

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*.<sup>18</sup> 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

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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.<sup>19</sup> While not revealing of any misuse or abuse, the averments in this case appear to have contributed to some procedural difficulties.<sup>20</sup> 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.<sup>21</sup> The CITC argued that obliging the defendant to disprove allegations ‘means that the trial process in [sic] not fair’,<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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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.<sup>25</sup>
- 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).<sup>26</sup> 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:

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<sup>25</sup> See Chapter 1 for a summary of the limitations identified by judicial authority.

<sup>26</sup> 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.<sup>27</sup>

- 2.24 The CITC noted this finding by the ALRC as well.<sup>28</sup> 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...<sup>29</sup>

- 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.<sup>30</sup> 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'.<sup>31</sup>
- 2.26 In its submission, the AGD indicated that the use of averments can be justified where it relates to 'formal and technical matters'.<sup>32</sup>
- 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:

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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...<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup>

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

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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'.<sup>37</sup> 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.<sup>38</sup>

- 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.<sup>39</sup>

- 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.<sup>40</sup>

- 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.<sup>41</sup>

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’.<sup>42</sup>

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.

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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.’<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> It is quite conceivable that a defendant could be faced with considerable difficulty and/or expense in obtaining evidence to

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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.<sup>47</sup> Any fact that is necessary to support an element of the offence must therefore be proved by the prosecution to the same standard.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

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'.<sup>52</sup> 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

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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.<sup>53</sup> 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.<sup>54</sup>

- 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.<sup>55</sup> 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*.<sup>56</sup> 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’<sup>57</sup> 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

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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,<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup> 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:

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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.<sup>61</sup>

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.<sup>62</sup>
- 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;<sup>63</sup>
- 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;<sup>64</sup> and
- averments made in relation to as general a range of matters as possible should not be permitted.<sup>65</sup>

2.54 The ACS submitted that the averment provisions in the Act should continue to be available in Customs prosecutions.<sup>66</sup> 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.<sup>67</sup>

2.55 The AGD stated that it ‘would not support a complete prohibition’<sup>68</sup> 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.<sup>69</sup>

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.

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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.’<sup>70</sup>

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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.<sup>71</sup> 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.<sup>72</sup>

## 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.<sup>73</sup> 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.<sup>74</sup> On 18 December 2003 the ACS notified the Committee that correspondence between senior Government ministers on this issue was continuing.<sup>75</sup> 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*.

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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 units<sup>76</sup>) 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

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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.<sup>77</sup>
- 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.<sup>78</sup> This has certainly been the case in regard to Customs prosecutions in the higher courts. In *Button v Evans*,<sup>79</sup> for example, the civil standard of proof was held to apply.<sup>80</sup> In *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce*,<sup>81</sup> Kirby P

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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’.<sup>82</sup> In *Comptroller-General of Customs v D’Aquino Bros Pty Ltd*,<sup>83</sup> Hunt CJ, noting the hybrid characterisation proposed in the *Brabham* case, took the view that Customs prosecutions are criminal in nature.<sup>84</sup> Nevertheless, the Court in this case eventually found that the civil standard of proof applied.<sup>85</sup>

- 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.’<sup>86</sup>

### 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.’<sup>87</sup> 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.<sup>88</sup>

- 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

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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”.<sup>89</sup>

- 2.83 Hayne J commented similarly to Kirby J regarding the undesirability of an either/or classification of Customs prosecutions as civil or criminal.<sup>90</sup> 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.<sup>91</sup>

- 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.<sup>92</sup>

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

- 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.

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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.’<sup>94</sup>
- 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.<sup>95</sup> 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...<sup>96</sup>
- 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.

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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.