

**GOVERNMENT RESPONSE TO THE
REPORT OF THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

'MODERN-DAY USAGE OF AVERMENTS IN CUSTOMS PROSECUTIONS'

BACKGROUND

During the last Parliament, the House of Representatives Standing Committee on Legal and Constitutional Affairs conducted an inquiry into averment provisions in Customs legislation. The Committee tabled its report on 31 May 2004.

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*.

COMMITTEE RECOMMENDATIONS

Recommendation 1

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.

Response:

The Government acknowledges the Committee's concern with regard to the availability of averments in certain legal proceedings initiated by the Australian Customs Service (Customs).

The Committee's concerns mirror comments by the Australian Law Reform Commission (ALRC) in its report No 95 - *Principled Regulation: Federal Civil and Administrative Penalties in Australia*. ALRC 95 was tabled in Parliament on 19 March 2003 by the then Attorney-General, completing a 3-year enquiry into federal civil and administrative penalty schemes. The report contained some recommendations specific to Customs legislation, including recommendations on averments and the characterisation of Customs prosecutions.

The ALRC noted the particular difficulties of proving some Customs offences, specifically those offences where the evidence may be located overseas. The Government is satisfied that its response to the ALRC's recommendations will produce amendments to the Customs Act that will alleviate the Committee's concern. Accordingly the Government will consider the Committee's views in the context of developing a response to the ALRC recommendations.

Recommendation 2

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.

Response:

The Government does not propose to adopt this recommendation.

As part of its response to ALRC Report 95, the Government is reviewing offence provisions in the Customs Act. The Government would prefer to consider the issues raised by this recommendation in the context of that response having regard to the usual Commonwealth policies in relation to the use of averments. In particular, the Government is aware of the principles of Section 13.6 of the Criminal Code (which deals with averments) when developing reformed offences in the Customs Act.

The Government also notes that Customs prosecutions are prosecuted before state and territory courts in accordance with their usual practice and procedures. The Government would prefer to achieve reform in this area by means of restructuring the offence provisions in the Customs Act, to minimise the extent to which state or territory courts are required to use special rules of practice and procedure for Customs prosecutions.

Recommendation 3

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.

Response:

The Government accepts this recommendation to maintain current arrangements.

Government policy developed in response to the Logan Report's review of the Attorney-General's Legal Practice (March 1997) resulted in significant reform of the Commonwealth legal services market.

In September 1999 amendment was made to the *Judiciary Act 1903* that ushered in changes to the delivery of legal services to the Commonwealth. The amendment opened up the Commonwealth litigation market to private law firm competition, where previously the Australian Government Solicitor (AGS) and Department/Agency in-house legal units had provided the bulk of legal services to the Commonwealth.

Under these revised arrangements, the AGS acts for Customs in Customs prosecutions and the Commonwealth Director of Public Prosecutions (DPP) acts for Customs in criminal prosecutions.

Recommendation 4

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*.

Response:

The Government notes this recommendation but does not support the development of guidelines or the use of subordinate legislation.

The Government endorses the role played by the AGS in drafting court documents that contain averments. Consistent with Recommendation 3 above, the Government will maintain current arrangements of utilising the AGS or DPP to advise on appropriate use of averments.

Recommendation 5

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).

Response:

The Government does not propose to adopt this recommendation.

The ALRC has previously recommended that all Customs prosecutions be classified as criminal (ALRC Report No 60). In its more recent review of Customs prosecutions (ALRC 95), the ALRC has recognised that Customs legislation covers a diverse range of regulatory policy objectives ranging from community protection to trade facilitation to accurate statistical reporting. The ALRC report acknowledges that some of the offences in the Customs Act are minor and regulatory in nature and not deserving of the opprobrium attached to a criminal record. Others, such as narcotics offences, clearly are criminal offences. The ALRC accepted that the minor regulatory nature of many Customs offences does not warrant the moral censure and stigma of a criminal conviction.

The Government is committed to removing the concept of a 'Customs prosecution' by classifying all offences in the Customs Act as either criminal or civil. This means that the ordinary rules of procedure and evidence for the relevant type of offence will apply. The Government is therefore satisfied that its response to the ALRC's recommendations will address the Committee's concerns regarding the applicable standard of proof in prosecutions for Customs offences. Criminal offences will attract the criminal standard of proof of beyond reasonable doubt.

Recommendation 6

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.

Response:

The Government does not accept this recommendation.

The Committee's recommendation is directed at a compensatory outcome when current evidence indicates that there is no legal or moral basis for such a conclusion.

The Government notes that:

- Customs did not improperly prosecute this matter. In summing up when dismissing the charges in 1995, the Magistrate rejected the defendant's submission that the prosecution was brought in bad faith.
- A significant factor in Customs' investigation of Mr Tomson was that he had previously been convicted of offences under the Customs Act. On 11 August 1984, Mr Tomson was convicted of offences of smuggling commercial quantities of clothing and making a false statement. He was fined \$1,800 and ordered to pay costs of \$488. Mr Tomson did not appeal.
- Customs was also aware that in the period between 1985 and 1987 Mr Tomson sent \$1,001,378.70 overseas for business purposes while telling Customs he only imported \$109,007.88 worth of goods. Mr Tomson valued the imported goods detained by Customs at only \$13,000.00 where an independent valuation indicated a much higher figure. Given his previous record and this disparity in money sent overseas and the very low value declared on goods imported, Customs was entitled to investigate his importing activities.
- In June 1988, Mr Tomson abandoned Federal Court proceedings which he had commenced to recover his goods based upon advice given to him by his Counsel following Counsel's opportunity to read confidential material prepared on behalf of Customs.
- Mr Tomson was not bankrupted by Customs in 1990 as claimed in media reports and Committee hearings. As accepted by the Committee and the Government, Mr Tomson was declared bankrupt in 1999, more than 12 years after the case in question commenced and four years after all court proceedings involving Customs were finished and a year after costs were settled.
- In 1998, Customs paid agreed legal costs of approximately \$100,000 to Mr Tomson's legal representatives.
- The Magistrate in the Local Court concluded that there was nothing improper in the conduct of the investigation and prosecution by Customs.
- Mr Tomson did not pursue legislative remedies available to him at the time of the Customs investigation.

- An independent legal Counsel at the NSW Bar examined the accusations of malicious prosecution and conspiracy to pervert the course of justice. After considering all the relevant Customs files, court transcripts and other relevant material Counsel concluded that he could find no evidence to establish the allegations. In Counsel's view, the material supports the conclusion that, generally speaking, Customs adopted a proper approach to Mr Tomson's investigation and prosecution.
- This independent Counsel's report was provided to the Committee and was not challenged in their report.
- Mr Tomson has not provided particulars that demonstrate the connection between the prosecution and any claimed commercial losses.

The Government recognises that it remains open for Mr Tomson to formally apply through normal mechanisms for an act of grace payment. Section 33 of the *Financial Management and Accountability Act 1997* provides that the Minister for Finance and Administration may authorise act of grace payments.

Individual claims for an act of grace payment are considered on their own merits. Evaluation of any claim includes a consideration of whether the claimant acted reasonably in relation to their dealings with the particular Commonwealth agency or to what extent, if any, the claimant contributed to the loss, or what steps they took to minimise or contain that loss.

In accordance with relevant provisions in the *Financial Management and Accountability Act 1997*, Mr Tomson will need to substantiate that the loss he claims to have suffered arose as a direct consequence of the actions or decisions of the Australian Customs Service.