

Secretary

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BY:.....

The Committee Secretary  
House of Representatives Standing Committee  
on Legal and Constitutional Affairs  
Parliament House  
CANBERRA ACT 2600

Dear Secretary

**Inquiry into averment provisions in Australian customs legislation**

Thank you for asking the Attorney-General's Department to make a submission to the Standing Committee's inquiry into averment provisions in Australian customs legislation.

*Use of Averment Provisions in Commonwealth Legislation*

2. Averment provisions have a long history in Commonwealth legislation. A provision similar to section 255 of the *Customs Act 1901* was included in the original version of the legislation (as section 240), section 35A was introduced in 1953. A provision similar to section 144 of the *Excise Act 1901* was included in the original version of that statute (as section 137).
3. A search of existing Commonwealth Acts reveals averment provisions in 16 statutes (see **Attachment A**). These provisions may be of general or specific application. For example, section 59 of the *Pay-Roll Tax Assessment Act 1941* applies to 'any taxation prosecution' whereas section 58 of the *Torres Strait Fisheries Act 1984* applies only to an offence against section 54 of that Act. In most cases, averment provisions are directed at establishing formal matters. The use of averments derives from English revenue law. As such, a majority of averment provisions in Commonwealth legislation apply to the collection of taxes, charges or levies. We note that averment provisions exist in all three major pieces of Commonwealth revenue legislation: the Customs Act, the Excise Act and the *Taxation Administration Act 1953*.

*Consideration by the Courts*

4. Averment provisions have been considered by the Courts in a number of cases. In *The King v Hush; Ex Parte Devanny* (1932) 48 CLR 487 (*Hush*), the High Court discussed section 30R of the *Crimes Act 1914*. The case concerned the solicitation of contributions to a banned association (the Communist Party) in contravention of section 30D of the *Crimes Act 1914*. Dixon J discussed the effect of the section 30R which was in substantively similar terms to section 255 (we note however that section 30R did not contain an equivalent provision to subsection 255(4)). Dixon J stated, at 507-508:

It is to be noticed that this provision, which occurs in a carefully drawn section, does not place upon the accused the onus of disproving the facts upon which guilt depends but, *while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt*, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus. [Emphasis added]

His honour then goes on to state, at 508:

The averment that the contributions were solicited for the association called the Communist Party must be considered with the text and the context of the solicitation itself and with the other material in the case.

5. In *Charlton v Rogers; Ex parte Charlton* (1985) 20 A Crim R 238 (*Charlton*) Ryan J, with whom Kelly SPJ concurred, considered the views of Dixon J in relation to section 255 of the Customs Act. His honour stated, at 240:

There is nothing in section 255 of the *Customs Act* which affects the principle that the burden rests upon the prosecutor of proving a respondent's guilt beyond reasonable doubt. The fact that the prosecution makes out a prima facie case does not throw the onus of proof on the respondent.

His honour then considered the decision of the High Court in *May v O'Sullivan* (1955) 92 CLR 654 concluding, at 240:

In my opinion nothing in s 255 of the *Customs Act* affects the principle that a magistrate cannot convict unless on the whole of the evidence and after giving consideration to the averments he is satisfied beyond a reasonable doubt of the respondent's guilt. Moreover, the failure of an accused person to displace the prima facie case does not mean that he ought to be convicted.

6. It is clear from these decisions that despite the use of an averment, the prosecution retains the ultimate burden of establishing beyond reasonable doubt that a criminal offence has occurred.

7. It is well established that, since *Hush*, matters put forward in an averment 'should be stated fully and with precision', at 501 per Gavan Duffy CJ and Starke J. Their honours also discussed the content of averments:

...it is not right to set out evidence supporting the allegation of the offence. Still less is it right to state irrelevant facts merely giving colour to the prosecution. And in our opinion it is not sufficient, under the provisions of sec. 30R to state evidence from which the result or fact necessary to sustain the offence charged may be inferred, without any allegation of the fact or result itself.

8. On the facts of the case, a majority of the Court, Rich J dissenting, held that the matters averred by the prosecution were not effective in sustaining a conviction. Evatt J was particularly critical of the length and complexity of the averments contained in the information finding that it amounted to an abuse of process. We note also the views of Derrington J in *Charlton* who states at 243:

The use of averments in this way is a powerful weapon which is given to the prosecution and accordingly must be exercised with due precision. This does not mean that it will be defeated by excessive or artificial scrutiny, but on substantive points a proper standard of accuracy is essential, in default of which the averment will fail.

9. These cases highlight that there is considerable authority on the appropriate use of averments, and that courts will balance the interests of justice in considering their use. Regardless of what is asserted in an averment, the prosecution must discharge its legal burden beyond reasonable doubt and a failure to do so will result in an acquittal.

### *The Criminal Code*

10. Unless expressly excluded, section 13.6 (Use of averments) of the *Criminal Code* applies to all Commonwealth criminal offences, whether they are contained in the Code or otherwise. Section 13.6 provides:

A law that allows the prosecution to make an averment is taken not to allow the prosecution:

- (a) to aver any fault element of an offence; or
- (b) to make an averment in prosecuting for an offence that is directly punishable by imprisonment.

11. The section reflects the concerns of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General who drafted the Code. In its commentary attached to the Discussion Draft of Chapter 2 of the Code, the Committee states 'the Committee believes that averment provisions are generally inappropriate' (at 107).

12. Section 13.6 limits the use of averments in Commonwealth legislation in two significant ways. Firstly, the prosecution may not aver a fault element in any offence. Chapter 2 of the *Criminal Code* provides for four fault elements: intention, knowledge, recklessness and negligence. Other fault elements may exist in specific legislative provisions. This limitation ensures that the prosecution cannot aver as to the mental state of a defendant at the time of the conduct in question. For example, the prosecution cannot provide an averment that a defendant intended to carry out the alleged criminal conduct.

13. The second limitation imposed by section 13.6 is that an averment may not be relied upon where the offence is directly punishable by imprisonment. Once again, this is a significant protection. It also reflects the view that it is for the prosecution to establish that a serious offence has occurred. It is inappropriate to place an evidential or legal burden on a defendant where this would place them in jeopardy of losing their liberty.

### *Criminal Law Policy*

14. 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. This raises issues of fairness for the defendant. However, we would not support a complete prohibition on such provisions, provided that there is strong justification for the use of averments in the circumstances and provided the provision conforms to section 13.6 of the *Code*. Generally speaking, provisions may be justified where they relate to formal or technical matters or where the matters are peculiarly within the defendant's knowledge.

### *Section 255 of the Customs Act*

15. Section 255 of the Customs Act is contained in Part XIV of that Act, which deals with "customs prosecutions". "Customs prosecutions" are defined under section 244 as proceedings for

the recovery of penalties under the Act, other than a number of specified penalties. Not all offences or penalty provisions in the Act fall within the category of "customs prosecutions".

16. The concept of a "customs prosecution" has caused some confusion, particularly in relation to whether civil or criminal procedure applies to their prosecution. Originally such prosecutions were brought in the Court of the Exchequer which, with some exceptions, applied civil rather than criminal procedures. The position in Australia is governed by sections 247 and 248 of the Customs Act. However, there is still debate as to the application of these provisions. It would appear that where a "customs prosecution" is brought in a Court of summary jurisdiction, criminal procedure and the criminal standard of proof applies. However, where a prosecution is brought in a superior or intermediate Court, civil procedure, and the civil standard of proof, apply. We note that the High Court has reserved its judgment in the case of *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors*, where it is hoped the Court will provide guidance as to what procedures apply in "customs prosecutions".

17. Section 255 is expressly limited in application to "customs prosecutions" under the Customs Act. In 1923 subsection 255(4) was inserted in the provision. This subsection provides that section 255 does not apply to:

- (a) an averment of the intent of the defendant; or
- (b) proceedings for an indictable offence or an offence directly punishable by imprisonment.

This subsection pre-dates section 13.6 of the *Criminal Code* and is theoretically broader in its application as it provides that an averment cannot be used in relation to an indictable offence as well as an offence directly punishable by imprisonment (see also subsection 59(4) of the Pay-Roll Tax Assessment Act and subsection 8ZL(4) of the Taxation Administration Act). Indictable offence is defined in section 4G of the Crimes Act, which states:

Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.

While we are not aware of any such provision in the Customs Act, section 14 of the *Sea Installations Act 1987* is an example of an indictable offence, as provided for in that Act, which does not attract a term of imprisonment. If a similar offence were included in the Customs Act, averments would not be available for its prosecution.

18. Section 13.6 of the *Criminal Code* does not apply to the Customs Act by virtue of section 5AA of that Act. However, section 255 provides comparable safeguards to those set out in section 13.6 of the *Code*.

#### *Consideration by the Australian Law Reform Commission*

19. The Australian Law Reform Commission (the Commission) has considered the averment provisions in the *Customs Act* in two of its reports: ALRC 60 *Customs and Excise* (ALRC 60:1992) and, more recently, ALRC 95 *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95:2002).

20. In ALRC 60, the Commission concluded that 'there is a need for averments in customs prosecutions in certain circumstances, principally where the evidence is located overseas, where the averment deals with formal or non-controversial matters, and where matters are such that they could easily be disposed of by the defendant without unfairness' (12.3). However, the Commission also noted that averments 'are capable of abuse' (12.3). In its proposed model legislation, section 255

was retained in modified form by clause 487. Clause 487 provided that a court may, on a directions hearing, disallow an averment where it would be unjust to allow the prosecution to rely on it. In considering whether an averment should be disallowed under the clause, the court should take into account:

- whether the averment relates to a matter that is merely formal and is not substantially in dispute,
- whether the prosecutor is in a position to adduce evidence and if not whether the difficulty derives from overseas or the obtaining of 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 the defendant has made.

21. In ALRC 95, the Commission reiterated its views about averment clauses in customs legislation. However, in the context of its other recommendations, the Commission argued that 'it should be left to Parliament to debate the merits of the averment process' (13.74). In Recommendation 13-1(c), the Commission states that the Customs Act and the Excise Act should be amended to 'specify in relation to each criminal offence whether averments are to be permitted'. Further, Recommendation 13-2 provides:

As recommended in the ALRC's report, *Customs and Excise* (ALRC 60, 1992), averments may be disallowed in any proceedings by the court if it is of the view that they would be unfair to the accused.

#### *Evidentiary Certificates*

22. In addition to averment provisions, a number of Commonwealth enactments contain evidentiary certificate provisions. Commonly, evidentiary certificates are used where a formal process has been completed prior to the issue of a certificate, authorisation or warrant. For example, section 15U of the Crimes Act provides that a certificate authorising a controlled operation is conclusive proof that the authorising officer was satisfied as to the facts required to be set out in the certificate. Section 15N requires that a certificate authorising a controlled operation contain a range of information such as the name of the applicant, a brief description of the proposed operation and the nature of the activities covered by the certificate. See also section 1389 of the *Corporations Act 2001*. Certificates are also used in relation to technical matters such as the results of, and process involved in, a scientific analysis (see section 58B of the *Fuel Quality Standards Act 2000*).

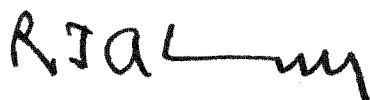
23. Evidentiary certificates can be relevant to criminal, civil and administrative proceedings. There is no provision similar to section 13.6 of the *Criminal Code* relating to evidentiary certificate provisions. Significantly, such provisions can apply in relation to offences that attract a term of imprisonment, see section 15U of the Crimes Act. Nonetheless, Commonwealth criminal and civil law policy takes a restrictive view of the use of evidentiary certificates as they may affect the fairness of proceedings. Generally speaking, it is preferable that the operation of the *Evidence Act 1995* not be restricted by the over-use of evidential certificates. They should only be used in unique circumstances usually involving formal or technical matters. Further, certificates should only be issued in relation to matters which fall clearly within the responsibility of, and are specifically known to, the issuer. Certificates should ordinarily be issued by senior officials who

are sufficiently responsible for ensuring that the process is not abused, see for example section 15U of the Crimes Act.

24. Where appropriate, the use of procedural safeguards is also encouraged. For example, under section 58B of the Fuel Quality Standards Act an evidentiary certificate may not be admitted in evidence unless the person charged or their legal representative has been given a copy of the certificate at least 14 days before it is sought to be admitted in evidence. The person who signed the certificate may be called as a witness and cross-examined as if they had given evidence of the matters set out in the certificate. Further, evidence given in rebuttal to the facts set out in the certificate must be considered on its merits.

We hope this submission is of assistance to the Committee. The action officer for this matter is Andrew Walter who can be contacted on (02) 6250 5615.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. J. Cornall' with a stylized flourish at the end.

Robert Cornall  
Secretary

## ATTACHMENT A

### Averment Provisions in Commonwealth Legislation

<i>Air Passenger Ticket Levy (Collection) Act 2001</i>	Section 15
<i>Commonwealth Electoral Act 1918</i>	Section 388
<i>Crimes Act 1914</i>	Section 30AA
<i>Customs Act 1901</i>	Sections 35A and 255
<i>Excise Act 1901</i>	Sections 60 and 144
<i>Fisheries Management Act 1991</i>	Section 166
<i>Great Barrier Reef Marine Park Act 1975</i>	Section 62
<i>Income Tax Assessment Act 1936</i>	Sections 220AY, 220AAZA, 221YHN, 221YHZJ, 221YR, 221YR, 221ZE and 221ZR
<i>Marriage Act 1961</i>	Section 117
<i>Passenger Movement Charge Collection Act 1978</i>	Section 13
<i>Pay-Roll Tax Assessment Act 1941</i>	Section 59
<i>Referendum (Machinery Provisions) Act 1984</i>	Section 140A
<i>Stevedoring Industry Levy Collection Act 1977</i>	Section 8
<i>Stevedoring Levy (Collection) Act 1998</i>	Section 13
<i>Taxation Administration Act 1953</i>	Section 8ZL, 8ZC and Schedule 1
<i>Torres Strait Fisheries Act 1984</i>	Section 58