Supplementary Statement by the Australian Customs Service to the House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into Averment Provisions in Customs Legislation

Terms of Reference

Customs has taken the Committee's Terms of Reference as being directed to whether there is any need for legislative change to the averments regime contained in the *Customs Act 1901*. With that in mind, Customs wishes to address two main points in this supplementary statement:

1. First, the appropriateness of the availability of averments in Customs prosecutions in this day and age.

2. Secondly, the four 'case studies' which have been identified in submissions made to the Committee, namely, the **Amron**, **Walsh** and **Pearson** matters referred to in the Business Law Section of the Law Council of Australia ("BLS") submission and the **Tomson** matter referred to in the submission made by Mr Rodda on behalf of Mr Tomson. In particular, Customs would like to provide some observations on whether any unfairness arose in those cases as a result of the use of averments.

Why averments should remain available for use in customs prosecutions

Turning then to the first of these issues, Customs notes that the BLS submission (paragraph 5) advances reasons why the original rationale for averments no longer applies. However, the reasons put forward by the BLS do not address the very real difficulties which Customs faces in its function of efficiently collecting Customs revenue. To start with, it must be emphasised that Customs operates in a self-assessment environment and so must be able to assume that information provided to it is correct. It is simply not correct to say, as asserted in the submission of Mr Rodda

(paragraph B.1.3), that it is the responsibility of Customs alone to determine the customs value of imported goods. It is the importer's responsibility.

The historical underpinning for the availability of averments in Customs legislation is covered in some detail in paragraphs 21-28 of Customs' principal submission. In short, 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. Because most Customs investigations and prosecutions will involve imported goods, many facets of the importation process will have a foreign component. For example, negotiations may take place overseas, contracts may be signed overseas, payment will be received there, and sometimes made there, and witnesses to the truth of those matters and the documents which support them will often be located there. The potential difficulties are all the more acute where importations via the postal system are involved.

A useful discussion of the jurisprudential and practical reasons for maintaining the averment provision in the Customs Act can be found in Chapter 12 of Volume 2 of the Australian Law Reform Commission ('ALRC') **Report No. 60: Customs and Excise** (Sydney: ALRC, April 1992) at 12.1-12.14. In particular, at 12.7-12.8 the ALRC looked at the problem of overseas evidence and analysed a case, *Gallagher v Cendak* (1998) VR 731, in which averments were used because it would have been very difficult and costly for Customs to establish certain facts through overseas evidence. The ALRC concluded that the case illustrated the kind of circumstances in which, from the standpoint of the general administration of justice, averments may be justified.

More recently, in **ALRC Report No. 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia** (Sydney: ALRC, December 2002) the ALRC noted (at paragraph 13.72) that ALRC 60 had considered the issue of averments carefully and had given support to the averment process having regard to the specific nature of Customs and Excise prosecutions. ALRC 95 then repeated the recommendation in ALRC 60 that section 255 of the Customs Act (the averments provision) be retained but with the addition of the safeguard that averments can be disallowed where the Court considered that their use would be unjust to the defendant.

The reason for this qualification (and some other qualifications set out in ALRC 60) was that the ALRC was concerned that the averment process represented a departure from the principle of the onus lying with the prosecution (a proposition with which Customs does not agree, as explained below) and what was said to be the potential for abuse. However, despite those reservations, the ALRC nevertheless concluded that it was appropriate that the availability of averments be maintained but with specific provision for a Court to control their use.

It can be seen then that as recently as last year the ALRC recognised the justification for the continued availability of averments in Customs prosecutions, albeit with certain protections.

The Attorney-General's Department ('AGD') submission addresses the question of whether the availability of averments is consistent with Commonwealth criminal law policy. The submission refers to section 13.6 of the Criminal Code which recognises that Commonwealth statutes may make provision for the use of averments in criminal prosecutions, but requires that certain procedural safeguards apply to such provisions. Paragraph 14 of the submission indicates that Commonwealth criminal law policy conforms to the view underpinning the Criminal Code, namely

that general averment provisions are inappropriate as they remove from the prosecution the usual burden of establishing facts that may constitute an offence. However, that policy does not lead to a complete prohibition on such provisions provided that there is a strong justification for the use of averments in the circumstances and provided that the provision conforms to section 13.6 of the Code. While the Criminal Code has no application to Customs prosecutions, the AGD submission notes (paragraph 18) that section 255 of the Customs Act provides comparable safeguards to those set out in section 13.6.

It should also be noted that provisions allowing for averments or like evidentiary aids are found in a number of Commonwealth statutes as detailed in paragraphs 68-75 and appendix D of Customs' submission. In particular, it can be noted that such provisions appear in some recently enacted legislation, including *A New Tax System (Taxation Administration) Act 1999*, the *Stevedoring Levy (Collection) Act 1998*, the *Air Passenger Ticket Levy (Collections) Act 2001*, and the *Environment Protection and Biodiversity Conservation Act 1999*.

In giving consideration to the question whether the availability of averments in customs prosecutions is appropriate, it is important that the Committee understands both the evidentiary effect of an averment, and secondly, the way in which averments are actually used. These issues are also canvassed in paragraphs 18-28 of Customs' submission.

Under the *Customs Act*:

- averments are an evidential aid and allow the prosecution to make an allegation of fact which is *prima facie* evidence of the fact averred;

- however, averments do not reverse the onus of proof. That is, although an averment may assist a magistrate to conclude

that the prosecution has established a case to the *prima facie* level, the prosecution nevertheless must still proceed to prove its case to the requisite standard. In the Local Court, this will be beyond reasonable doubt. Accordingly, it may be that an averment of a fact without other evidence will not be sufficient to persuade a Court to find that fact has been proven beyond reasonable doubt. There is a useful discussion of these matters at paragraph 12.4 of ALRC 60.

- another way of looking at this is that averments do not alter the standard of proof. Accordingly, even though a fact is averred, the prosecution must still establish that fact beyond reasonable doubt and may require other evidence to satisfy a court to that standard. For this reason, Customs contends that the submission in paragraph 4 of the BLS submission that the averment system puts Australia in breach of its obligations under the International Covenant on Civil and Political Rights is incorrect and should not be accepted;

- the use of averments does not mean that a defendant bears the onus of disproving the fact averred. Rather, it would be enough if evidence called by a defendant cast sufficient doubt on the fact averred so that the Court would be obliged to give the benefit of that doubt to the defendant;

- averments cannot be used in proceedings involving an indictable offence or an offence directly punishable by imprisonment;

- Averments cannot be used to aver intent (or more accurately, such an averment will not carry *prima facie* evidentiary value);

- averments cannot be used to aver a question of law (or more accurately, such an averment will not carry *prima facie* evidentiary value).

Custom's submission at paragraphs 39 and 40 sets out the policy approach which governs the way in which averments are used in practice. This policy is consistent with the principles underlying the recommendations in ALRC 60 and 95 and is also consistent with the observations as to criminal law policy found in paragraph 14 of the AGD submission.

Finally on this point, the submission of the BLS contained in paragraph 1(a) starting on page 11 of their submission needs to be addressed. That submission puts forward the proposition that ' if the prosecution is using averments in order to charge a person with an offence, that necessarily means that the prosecution is making an assumption about some element of the offence and has not properly investigated or obtained evidence of those elements'. Customs says that this is not the position at all. 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. As pointed out in paragraphs 35 - 38 of Customs' submission, 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. For example, it may be that there is evidence which is not in admissible form but which nevertheless supports the existence of the relevant fact.

The logical conclusion of the BLS contention seems to be that Customs should only commence and run a prosecution if there is admissible evidence of each element of the offence. As the submission goes on to note, if that were the case, it would then not be necessary for the prosecution to use any averments at all. Accordingly, that submission

does not advance the debate. In any event, it should be emphasised that it is extremely rare for a customs prosecution to be run without evidence being called to support each substantive fact which is averred. That is done in recognition of the principle that notwithstanding the availability of averments, the onus of proving each element of an offence to the requisite standard of proof remains with the prosecution and there is always the risk that a mere averment alone will not be sufficient to move a Court from being satisfied of the existence of a *prima facie* case to being satisfied of a fact which must be proved beyond reasonable doubt or on the balance of probabilities.

The four case studies

The BLS in its submission to the Committee has provided examples of what it says are "Cases evidencing problems with averments".

The cases cited are Neil Pearson & Co Pty Ltd v C-G of Customs; Walsh v Allegretta & Anor and CEO of Customs v Amron.

Neil Pearson & Co Pty Ltd v C-G of Customs

The BLS acknowledges that the Court of Criminal Appeal (NSW) ("CCA") judgment in that case allowed an amendment to the relevant averment, which dealt with the dry linen capacity of imported washing machines. The dry linen capacity was relevant to the tariff classification of the washing machines. However, the BLS says that it took two appellate courts to decide the issue and that the decision allowed the prosecution to tender fresh evidence. The defendant argued in the CCA that the averment was impermissible because it was an averment of law.

Customs makes the following points in relation to this example:

- The purpose of the averment was never in dispute. The defendant's argument that it was an averment of law was therefore technical and the conclusion of the CCA that it was an averment of law was

readily overcome by an amendment, the terms of which the CCA suggested. Although the decision to allow the amendment was one for the trial judge, the CCA apparently endorsed such an amendment being made and in the event, the trial judge did so. Accordingly, those four judges plainly did not consider that any unfairness to the defendant would flow from the amendment.

- In fact, no fresh evidence was required nor contemplated by reason of the amendment.
- The defendant was convicted.

Walsh v Allegretta & Anor

In this case Customs commenced actions in the Supreme Court of Western Australia by Statement of Claim against Giacomo Allegretta ("the first defendant") and Francesco Allegretta ("the second defendant") for breaches of the *Excise Act 1901* and the Customs Act in relation to cigarettes which were entered with Customs for duty free export from Australia as ships stores. In fact, the cigarettes were not delivered to the ships as authorized by Customs. There was evidence that the cigarettes were delivered to various retail outlets in the Perth metropolitan area.

The case was pleaded alleging that either the first defendant alone or both the first and second defendants on the basis of joint enterprise had committed the offences. Proof of a business partnership between the first and second defendants was important for the case alleging joint enterprise.

The BLS says that averments alleging a partnership between the first and second defendants and, in the alternative, a sole proprietorship carried on by the first defendant were disallowed by the trial court as improper and caused expense and delay by unnecessarily taking up court time. Customs make the following points in relation to this example:

- BLS' concern seems to be directed more to the pleading of the case in the alternative than the averments as such.
- In any event, the trial judge did not criticise either the pleading of the case in the alternative or the form of the averments. The Court merely held that the pleading of the alternative case - so as to also make the second defendant liable for the alleged offences - was not established by the evidence and that the averments did not go far enough to establish the case against the second defendant. While Customs did in fact adduce evidence of the existence of the partnership independent of the averment, the trial judge was not satisfied that the evidence taken as a whole established a partnership.
- The first defendant was convicted of the offences.
- Customs is not aware of any basis upon which it can be said that the relevant averment in this case led to the wasting of court time.

CEO v Amron

Customs commenced a customs prosecution in the Supreme Court of Victoria by Statement of Claim alleging the smuggling of 170,000 cigarettes from Indonesia to Australia. The duty payable on the cigarettes was $37,632.81.

At a compulsory mediation the defendant - who was represented by lawyers, signed terms of settlement agreeing to plead guilty to smuggling and making a false statement to Customs. Just prior to the hearing at which the defendant was to enter the pleas of guilty and have penalties imposed his lawyer ceased to act for him.

The defendant did not appear at the hearing and the case proceeded in effect as an *ex parte* hearing. Customs relied on the averments in the Statement of Claim to the extent allowed at law and adduced other

evidence and called witnesses in much the same way as if the defendant were present. The hearing of the case occupied two days.

The BLS says that many averments were found to be averments of intention and struck out, and accordingly this process of assessing each averment took up a significant portion of Court time.

Customs would make the following points in relation to this example:

- Although the statement of claim pleaded averments of intention or state of mind, at the outset of the hearing Customs invited the Court to disregard those averments. Customs called evidence to prove intent. Accordingly, no significant amount of time was taken up with the issue of averments of intention at all.
- The prosecution did seek to rely on the averments to the effect that statements in the customs entries were false and false to the knowledge of the defendant and that the defendant deliberately omitted details from the entry (that the importation contained cigarettes). Presumably because of the *ex parte* nature of the hearing, the Court proceeded to give very careful consideration to whether these averments of knowledge were permissible. The Court concluded in favour of the prosecution that it was permissible to aver as to the fact of the state of the defendant's knowledge and that in respect of the smuggle and evasion charges, it was therefore permissible to aver that the entries were false to the defendant's knowledge and that the defendant deliberately omitted details from the entry. These were matters which were relevant to establishing whether there was an intent to defraud the revenue but did not amount to averments of the requisite mental state. However, it should be noted that the Court also ruled that it was not possible to rely on those averments for the lesser charges of false entry as they amounted to averments of the mental element or state of mind which the prosecution had to establish for those charges.

- The AGS instructing solicitor has confirmed that it is not the case that the court was 'required to be involved in a lengthy assessment of each and every [averment] by Customs to determine whether they were proper' and 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.
- The result of the hearing was that the defendant was convicted of the offences to which he had earlier agreed to plead guilty, and penalties and costs were imposed.
- This case is not an isolated example of a defendant failing to appear at the hearing. , The use of averments in such cases facilitates the efficient proof of the allegations pleaded in a Statement of Claim (or in the Information and Summons in cases dealt with in courts of summary jurisdiction).

Mr Rodda in his submission makes a number of allegations regarding the averments relied on in the case **C-G of Customs v Tomson and Keomalavong.**

Those cases involved charges against Tomson and Keomalavong arising from five shipments of imported clothing from Thailand, Hong Kong and Taiwan. The charges in respect of these shipments were that the goods had been smuggled, customs duty was evaded and false entries and statements had been made to Customs. Although the Magistrate found a *prima facie* case in relation to each offence, following the defendants' cases, he held that the prosecution had not proven the offences beyond reasonable doubt. The most significant finding in this regard was that the witness relied on by Customs to give expert evidence regarding the value of the goods operated in a different segment of the market to the

defendants and that the evidence of the valuation witness relied on by the defendants was to be preferred.

The allegations made by Mr Rodda include that the averments pleaded by the prosecution were sworn knowing they were false (and may amount to perjury) and that they provide direct evidence of a wilful and deliberate conspiracy to pervert the course of justice. The basis for these very serious claims is not at all clear and it is difficult to ascertain precisely what is being said as to why each of the relevant averments should not have been made beyond the bald assertion that they were false. Customs rejects these allegations and considers that they have been made without any proper foundation at all.

Further, for the following reasons, Customs believes that no unfairness resulted from the use of averments in these cases:

- in finding a *prima facie* case against Keomalavong, the Magistrate referred to the documentary evidence that was before the Court and the oral evidence from Customs' expert Mr Prelea and others. The case was not established solely (or even primarily) on averments. It may be noted that no submissions as to whether a *prima facie* case had been made out were made on behalf of Mr Tomson, although he was invited to do so;
- in any event, the prosecution in fact called evidence in relation to each question of fact to be proved, save for the formal matters that the person who laid the information was a Customs officer and had a proper delegation. Accordingly, the averments had little work to do. It is simply not correct to assert, as Mr Rodda has done in his letter dated 20 April 2003, that the averments were the only evidence before the Court of any wrongdoing on the part of the defendants. One only has to read the decision on the *prima facie* case (transcript of 20 April; 1994) to see that this was not so;

- no objections were made by either defendant in relation to most of the averments and most of the defendants' submissions on averments were upheld;
- As a result the word 'false' was struck from the averments containing that word on the basis that this amounted to an impermissible averment of law. Customs application that the word 'false' be substituted with the word 'incorrect' was refused. No objections were made to the balance of the words in the affected averments. Secondly, the defendants submission was upheld that the word 'duty' and related monetary amount should be struck from the averments containing those words, again, because it was held those words amounted to an averment of law. As a result the whole of the affected averments could not be relied on. The defendants also objected to the words 'caused', 'engaged' and 'arrange' as they appeared in different averments. However, the Magistrate concluded that these were proper averments of fact. As a consequence, any averments in impermissible form were not relied on by the magistrate in determining a *prima facie* case.
- As to any suggestion that there was no basis to make the averments, the simple answer is that the Magistrate found that there was a *prima facie* case or, in other words, evidence which was capable of leading to a conviction. That necessarily means that there was a proper evidentiary basis for commencing a prosecution.
- It is critical to understand that the prosecution at the time of the making of the averments did not have before it the oral evidence which the defendants eventually adduced, including from their expert. Also, Tomson had declined to co-operate with the investigation;

- Further, the Magistrate was asked to make an order for costs in favour of the defendants on the basis that the prosecution could never have had faith in this case. Indeed, the submission was made that it would be open to the court to find bad faith. The Magistrate rejected that submission and concluded that there had been no improper or unreasonable conduct in the course of the investigation or the proceedings themselves. On this basis, the Magistrate declined to order costs in favour of the defendants.
- Although the Magistrate's ruling on costs was overturned in the Supreme Court, of New South Wales this was on the basis that he had applied the wrong legislation. Justice Abadee of the Supreme Court did not (and was not required to) deal with whether or not he would have agreed with the Magistrate's view that there had been no improper or unreasonable conduct on the part of Customs in the course of the investigation or the prosecution proceedings. So, the Magistrate's view in this regard remains undisturbed and provides a clear and contemporaneous indication that there was nothing inappropriate about the investigation and prosecution of Tomson (or Keomavalong);
- Insofar as it is alleged that the making of the averments may amount to perjury (Rodda letter dated 20 April 2003), this of course would be a matter for a court and not Parliament and it should be noted that Mr Rodda has never sought to raise this question before any court. In any event, there is simply no basis to even raise the question, which seems to be asked solely on the basis of charges not having been made out. While Mr Rodda asserts that 'the defence was able to show that the averments were false', in fact the Magistrate's ruling was that Customs had not proved its case beyond reasonable doubt. There is a world of difference between the two points.

Beyond those comments, Customs does not believe that an in depth review by this Committee of all of the matters raised by Mr Rodda would assist in its consideration of whether there should be some legislative amendment to the averments regime in customs legislation. For the reasons given, the use of averments in the Tomson case did not give rise to any unfairness and so cannot have any bearing on that question.