Law Council
OF AUSTRALIA

Ms Gillian Gould
The Committee Secretary
House of Representatives Standing Committee
On Legal & Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Ms Gould,

Inquiry into the Averment Provisions in Australian Customs Legislation

I have pleasure in enclosing a submission which has been prepared by the Customs and International Transactions Committee of the Business Law Section of the Law Council of Australia ('the Committee') to the House of Representatives Standing Committee on Legal and Constitutional Affairs' inquiry into the averment provisions in Australian customs legislation.

Please note that the submission has been endorsed by the Business Law Section but has not been considered by the Council of the Law Council of Australia.

Yours sincerely,

Michael Lavarch
Secretary-General

8 May 2003

Enc.

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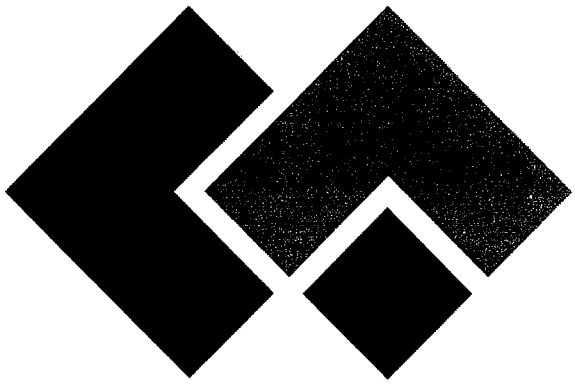
CUSTOMS AND INTERNATIONAL TRANSACTIONS COMMITTEE

BUSINESS LAW SECTION

LAW COUNCIL OF AUSTRALIA

SUBMISSION TO THE INQUIRY INTO THE AVERMENT PROVISIONS IN AUSTRALIAN CUSTOMS LEGISLATION BY THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS



Law Council
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INTRODUCTION

1. Submission

The Customs and International Transaction Committee of the Business Law Section of the Law Council of Australia ('the Committee') welcomes the opportunity to make this Submission ("**Submission**") to the Inquiry into the Averment provisions in Australian Customs Legislation ("**Inquiry**") conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs ("**Legal and Constitutional Affairs Committee**"). Please not that Submission has been endorsed by the Business Law Section but has not been considered by the Council of the Law Council

2. The Customs and International Transactions Committee

As the Legal and Constitutional Affairs Committee may be aware, members of the Committee have particular expertise in relation to the *Customs Act* 1901 ("**Customs Act**") and related legislation. The Legal and Constitutional Affairs Committee would be aware that the Committee has made a number of submissions to Parliament in relation to proposed Customs Legislation in past years.

3. Consider the full context of the Averment Powers

In making this Submission, the Committee believes it is important to look at the full context of the Averment powers. This would include the following.

(a) The historical background of the Averment powers

(b) Identify views of the Averment Powers by other parties, most specifically, the Australian Law Reform Commission ("**ALRC**").

(c) Outline some examples of recent cases (both reported and unreported) involving the Averment powers which reflect the problems which the Committee perceives with the Averment powers.

(d) Recommendations of the Committee regarding the future of the Averment powers.

4. Suggestion to review Averment Powers in other Legislation

In making this Submission, the Committee will only comment on the Averment powers of the Customs Act. However, the Committee also notes that similar provisions exist in Tax Legislation (Section 8ZL of the *Taxation Administration Act* 1953) and believe that those equivalent provisions also deserve review in the same fashion as the review of the Averment powers in the Customs Act.

HISTORICAL BACKGROUND TO THE AVERMENT POWER

1. Averment imported from UK Legislation

The Averment provisions were imported into Australian Legislation from similar legislation in the United Kingdom.

2. *Corresponding provisions overseas*

The Averment provisions appear to be a common feature of Customs and Excise Legislation in other countries.

(a) As referred to in the Australian Law Reform Commission Report No. 60 entitled "Customs and Excise" ("**ALRC 60**") at paragraph 125, Subsection 154(1) of the Customs and Excise Management Act (1979) (UK) provides that Averments of certain matters constitutes "suspicion evidence" of those matters. Subsection 154(2) of that Legislation also provisions that the Averment proving other matters is specifically placed on a defendant.

(b) Arrangements bearing similarity to our Averment process exists in the United States Customs Legislation. For example, Sections 1615 and 535 place obligations on defendants to prove "averred" statements made by Customs in relation to various prosecutions. Copies of these Sections are annexed to this Submission marked **"A"**.

3. *Australian Colonial Customs Legislation*

References to "Averment" (although not necessarily relating to Customs prosecutions) appear in earlier "Colonial" versions of the Customs Act (for example in Section 260 and 264 of the Victorian Customs Act 1883 and Section 268 of the Victorian Customs Act 1890 relating to smuggling).

4. *Wollaston, 1904 and all that*

The current version of Section 255 of the Customs Act which sets out the Averment arrangements is in the same form as that originally set out in the Customs Act when it was introduced in 1901. Some contemporary views of the Averment provisions can be found in the commentary by Dr Wollaston, the first Comptroller General of Customs and his 1904 text ("*Customs Law and Regulation*") where he stated at page 169:

> "This is a most important provision, and though not by any means novel in Customs Acts, has been as much commented upon as if it were something altogether new and unprecedented.
>
> It is a very necessary provision, inasmuch as in may instances whilst there could not be the slightest moral doubt that the offender was guilty, yet it would be next to impossible to actually prove it by direct evidence. For example, a box of tea with certain marks thereon is found in the procession of A, and this box the Customs have suspicion was smuggled. The shipment was a thousand boxes, all with the same marks. The Customs in the case aver that the duty had not been paid on this particular box and the proof to the contrary is thus thrown upon the defendant.
>
> Now if the Department had to prove the non payment, it would have to trace and account for every one of the thousand boxes referred to, so as to show the particular box in question had been illegally dealt with. Some of the boxes may have been used [duty having been paid], some exported, some bonded, and other scattered all over Australia. The task would be an impossible one. Moreover, even supposing that each box of the shipment could be accounted for, the Customs would still have to meet the defence that though the marks on the box was duty paid, bought at the grocers and placed in the box for convenience, which defence might of course be true.

On the other hand, it should be comparatively easy for the defendant to show duty had been paid, or at all events, establish the overwhelming inference that it had been.

The Averment referred to would relate to any fact connected with the prosecution such as the official position of the prosecutor or of any officer, the fact of any regulations or orders having been duly made or in force, the validity of any rule, or any matter pertinent to the prosecution etc."

5. Why the original rationale no longer applies

Notwithstanding the original comments by Dr Wollaston, the view of the Committee is that many of the original rationale for the inclusion of the Averment power in 1901 no longer apply to support the retention of broadly-based Averment power. This conclusion is reached from the following changes since 1901.

(a) There appears to be little support in modern jurisprudence for the notion that Averments should be used to overcome a lack of direct evidence where "there could not be the slightest moral doubt that an offender was guilty". Conventional theory places the onus on the prosecution to prove guilty by direct evidence. A lack of direct evidence would translate into a "not guilty" finding. Civil, strict and absolute liability as existing under the Customs Act have no relation to the "moral doubt of guilt". Further, the ability of Customs to issue Infringement Notices based on its assessment of compliance activity is many miles from the type of events contemplated by Wollaston.

(b) Customs have new and more sophisticated audit and analytical powers which would enable Customs to prove facts of the type contemplated by Wollaston's comments. There is a current change in emphasis for Customs from Trade Facilitation to Border Security and enhanced statutory compliance. In particular, recent changes to the Customs Act through the Trade Modernisation Legislation 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.

(c) The last paragraph in the quotation from Wollaston talks of the type of situations to which Averments should apply. In practice, Averments are used to a more significant degree.

NATURE OF THE AVERMENT POWER

1. Nature of the Averment Power

Under Section 255 of the Customs Act, the prosecution is permitted to make Averments in an initiating process of prosecutions and they are then considered prima facie evidence of the matter to which the averment relates. Contemporary views suggest that they are often used to prove formal and non-controversial matters such as the date of arrival of the ship, a rate of exchange of foreign currency or the authority of informant for commence prosecutions. They may also be used to introduce evidence from overseas which we would unable to be introduced otherwise (see paragraphs 45 and 46 of ALRC 60).

2. *Qualifications to the Averment Process*

As set out in ALRC 60 (see paragraph 12.4), a number of qualifications are placed on the use of Averments. These include the following.

(a) They do not make evidence admissible which is otherwise in admissible.

(b) It is not admissible to aver assertions of guilt, irrelevant facts, opinions and interpretations of documents available in a Court.

(c) Courts have adopted a cautions approach to averments requiring them to be drawn with "care and precision" and remaining "sensitive to the possibility of injustice arising from their use.

IMPACT OF DEBATE ON THE NATURE OF CUSTOMS PROSECUTIONS

1. *What is a Customs Prosecution?*

The significance of the Averment power is heightened by the fact that it applies in relation to "Customs prosecutions". These are defined in Section 244 of the Customs Act to be prosecutions for the recovery of a penalty. These include a significant number of offences including prosecutions under Section 233 and Section 234 of the Customs Act for "smuggling" and "recovery of duty underpaid" respectively.

2. *Customs Prosecutions - Criminal or Civil Proceedings?*

The members of the Legal and Constitutional Affairs Committee may not be aware that there is currently significant debate as to whether Customs prosecutions are civil or criminal in nature, which has an impact on the appropriate standard of proof to be applied. Put simply, it is clear that there is now a divergence of authority between some decisions of the New South Wales Court of Appeal, the Federal Court and the Queensland Supreme Court of Appeal which hold either that Customs prosecutions are criminal in nature and that a criminal standard of proof applies[1] compared to other decisions in the New South Wales Court of Appeal and the Victorian Supreme Court to the effect that Customs prosecutions are, in fact, civil proceedings and a civil standard of proof should apply, albeit applied with care adopting the approach in the *Brigginshaw* Case[2] which provides that the more serious the allegation, the more carefully the evidence is considered and the standard is applied. The issue as to the nature of Customs prosecutions is currently before the High Court in the *Labrador Liquor* Case[3] and we are awaiting a decision in that case which may go some way to resolve some of the debate in this area.

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[1] See comments of Hunt J in *Moore v Jack Brabham Holdings Pty Ltd (1986) 7 NSWLR 470* at 482, Kirby P in the New South Wales Supreme Court of Appeal in *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce (1988) 85 ALR 640* at 650 and 652, Hunt CJ at CL in *Comptroller-General of Customs v D'Aquino Brothers Pty Ltd (1996) 85 A 517* at 530-531 and the decision of the Queensland Supreme Court of Appeal in *Labrador Liquor Wholesale Pty Ltd and others v CEO of Customs [2001] QCA 280*

[2] For the Brigginshaw case see the decision of the High Court in Brigginshaw v Brigginshaw (1938) 60 CLR 336

[3] *CEO of Customs v Labrador Liquor Wholesale Pty Ltd and others No. B46 of 2002*, heard on 11 December 2002

The Committee is of the view that should the High Court resolve that Customs prosecutions are criminal prosecutions to which a criminal standard of proof applies, then it is entirely inappropriate to apply the Averment process to such prosecutions.

However, even if the High Court holds that the Customs prosecutions are civil in nature, that decision is likely to be on the basis that the *Brigginshaw* approach continue to be used in Customs prosecution. This approach recognises that Customs prosecutions are extremely serious in nature given the significant financial penalties associated with successful prosecution and the adverse consequences which follow from a Customs prosecution[4].

Even if a prosecution is unlikely to follow from an Averment alone, it appears to be inappropriate for the Averment process to even apply to such prosecutions. As a result, the Committee remains of the view that the acknowledged seriousness of Customs prosecutions suggest that the Averment arrangements should not apply regardless of a final decision on the nature of Customs prosecutions in the *Labrador Liquor* Case.

REVIEW OF THE AVERMENT POWER BEFORE THE ALRC REPORTS

1. Recommendations of the 1982 Inquiry by the Senate Standing Committee on Constitutional and Legal Affairs

As reported in paragraph 12.10 of ALRC 60, in its 1982 Report "The Burden of Proof in Criminal Proceedings" (at paragraph 7.16) the Senate Standing Committee on Legal and Constitutional Affairs recommended specific Legislation on certain proposals relating to the onus of proof and averments. For the sake of completeness, the Committee sets out the proposals of the Senate Committee as follows:

> "(b) the Parliament should enact Legislation to ensure that existing and future averment provisions are only resorted to by prosecutors in the following circumstances:
>
> (i) where the matter which the prosecution is required to prove is formal and does not itself relate to any conduct on the part of the defendant; or
>
> (ii) where the matter in question relates to the conduct of the defendant alleged to constitute an ingredient in the offence charged and is peculiarly within the defendants knowledge.
>
> (c) When seeking to rely upon averments provisions, prosecutors should be required to have regard to the following criteria:
>
> (i) averments should be stated that they are sufficient in law to constitute a charge;

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[4] See the comments of the Western Australian Supreme Court in *CEO of Customs v Tonmill Pty Ltd & Ors [2001] WASC 77* at paragraph 26 as follows:

> "It is convenient when considering the appropriate penalty for the offences before me to recall the reasoning of Kitto J in the *L Vogel & Son Pty Ltd v Anderson* to the effect that offences of this kind are in a field in which punishments for deliberate offences must be server. The Customs laws represent the judgement of Parliament upon an important aspect of the economic organisation of the community and the object of the penal provisions is to make that judgement as effect as possible."

(ii) the facts and circumstances constituting the offence shodul be stated formally and with precision;

(iii) the Crown should not aver matters of law or matters of mixed law and facts;

(iv) averment should not amend or alter the rules pleading although regulating the statement of the offence; and

(v) averments should be restricted to the ingredients of the charge and information should not contain evidentiary material."

In response to the Senate Committee Report, the (then) Attorney General on 15 October 1986 responded that:

> "Evidentiary aid provisions should only cast an evidential burden on the defendant and should only be relied on for proof of matters which are essentially formal in nature.
>
> The Committee's recommendations in relation to Averment provisions have been adopted in consideration of Commonwealth Legislation. However, it is not proposed that this is the time to enact special Legislation in this area."

It is the view of the Committee that following two (2) reports of the ALRC it is now time for such special Legislation.

2. *Consideration by the Gibbs Committee*

As pointed out in ALRC 65 (see paragraph 12.2), Averments were considered by the Gibbs Committee[5] but it suggested that the question of averments be deferred until the (then) Law Reform Commission "had dealt with the subject of Averments under Customs and Excise Legislation in connection with its review of that Legislation.

Accordingly, it is now appropriate to consider the recommendations of the ALRC in ALRC 65 and ALRC 90.

POSITION OF THE ALRC

1. *ALRC reservations to the Averment Powers*

Doubtlessly, the Legal and Constitutional Affairs Committee will receive a Submission from the ALRC into this Inquiry. However, the Committee believes it is appropriate to refer to the fact that the Committee has previously made Submissions to the ALRC to the effect that the Averment powers need to be removed in their entirety, based on previous concerns regarding the impact of the Averment process. In the two ALRC Reports which touch on the operation of the Customs Act (ALRC 60 and Report No., 95, 2002 "Principled Regulation" ("**ALRC 95**")), the ALRC has recommended the retention of the Averment process, allowing use of the Averments

[5] "Review of Commonwealth Criminal Law" Final Report, December 1991, AGPS, Canberra, para 9.25

by a prosecutor but with the addition of a provision for the disallowance of the Averments where the Court considered their use to be unjust to the defendant[6].

2. *Limitation to ALRC Recommendations*

However, notwithstanding the recommendations of the ALRC, it should be kept in mind that the ALRC did not believe that it could recommend the comprehensive removal of the Averment procedure. As pointed out in paragraph 13.73 and 13.74 of ALRC 95.

> "13.73 ALRC 60 expressed concern with the Averment process as they are a substantial departure from the principle of the onus lying with the prosecution, and for their potential to be open to abuse. However, due to the nature of the evidence in Customs matters, the Report ultimately recommended that the Averment process remain with the qualifications described at para 13.48.
>
> 13.74 This Inquiry shares the concerns expressed in ALRC 60. **However, in the context of a major reclassification of offences, as proposed, it should be left to Parliament to debate the merits of the Averment process (our emphasis).** The ALRC therefore recommends that the legislation specify in relation to each criminal offence whether Averments are to be permitted. The ALRC also endorses the recommendation made in ALRC 60 that Averments may be disallowed if the court is of the view that their use would be unfair to the defendant."

3. *Parliament not to be as limited as the ALRC*

Accordingly, the Committee is of the view that the recommendation of the ALRC that the Averment process be retained is limited by the view of the ALRC that the debate on the merits of the Averment process should be undertaken by the Parliament (as is now the case with the Inquiry). Accordingly, in making its recommendations, the Inquiry should note the significant concerns which the ALRC has with the Averment process and should consider itself entitled to recommend the total removal of the Averment process.

4. *Breaches of International Obligations*

Australia is a party to and bound by the International Covenant on Civil and Political Rights (the "**Covenant**"). That Covenant is also incorporated into Australian law. It can be found in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act*, 1986.

We submit that the averment system puts Australia in serious breach of its obligations under the Covenant.

Article 2.2 of the Covenant requires each state party to adopt such legislative and other measures as are necessary to give effect to the rights recognised in the Convention.

Amongst the rights so recognised 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 defendant to disprove one or

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[6] See paragraph 12.12 of ALRC 60, paragraphs 13.48, 13.71 to 13.74 of ALRC 95 and Recommendation 13-2 of ALRC 95.

more element of the alleged offence. The averment system breaches the Convention.

We have stated above that it is unfair for the defendant to have to resource disproving allegations, perhaps because the prosecution finds it inconvenient of expensive to prove the allegations. We submit that that means that the trial process in not fair and that is another breach of the Covenant, which requires that everyone shall be entitled to a fair hearing (Art 14.1). The averment system breaches the Convention for this reason too.

The averment system compels the defendant to give testimony. Other, ordinary criminal proceedings do not require a defendant to give evidence. This then exposes the defendant to cross-examination and the evidence that arises from that can be used against him or her. In effect, the defendant is compelled to give evidence against himself/herself. This is another breach of the Convention, which provides that people are not to be compelled to testify against himself (Art 14.3(g)). The averment system breaches the Convention for this reason too.

Australia needs to bring itself into line with its obligations under the Convention and must abolish the use of averments once and for all.

CASES EVIDENCING PROBLEMS WITH AVERMENTS

Members of the Committee have a long history of providing evidence of concerns as to the potential misuse or abuse of the Averment process (see paragraph 12.6 of ALRC 60). Some examples are as follows.

1. Neil Pearson & Co Pty Ltd & Another v Comptroller-General of Customs

This decision of the Court of Criminal Appeal of the New South Wales Supreme Court (reported as (1995) 38 NSWLR 443) is one recorded example of difficulties experienced with the Averment process.

The case was associated with proceedings taken by Customs pursuant to Section 234 of the Act to recover Customs duty allegedly underpaid by the Appellant (as the Defendant in the recovery proceedings in the District Court of New South Wales). In earlier civil proceedings (involving cases before the Administrative Appeals Tribunal, a single judge of the Federal Court and the Full Federal Court), decisions had been made regarding the Tariff Classification of washing machines and the (non) availability of a Tariff Concession Order which would have resulted in no Customs duty being payable on those goods. The conclusion of the Court was that Customs duty at a rate of 30% would be payable on the items in question.

Customs then proceeded to take criminal proceedings in the District Court of New South Wales for recovery of Customs duty allegedly underpaid pursuant to the (then) provisions of Section 234 of the Customs Act. The case required the District Court Judge to make his own decision regarding the Tariff Classification associated with the goods. Accordingly, the District Court Judge referred certain matters to the Court of Criminal Appeal as a "stated case" including whether he was bound by the Federal Court decision on Tariff Classification of the goods.

One other issue before the Court of Criminal Appeal was the effect of an Averment by Customs in relation to the goods. After consideration of relevant authorities, the Court of Criminal Appeal held (at page 461) that the relevant Averment was impermissible but that it could be amended pursuant to Section 251 of the Customs

Act and successfully be used against the Defendant in the proceedings in the District Court.

Notwithstanding the ultimate judgment permitting a possible amendment to the Averment, one crucial issue arising from this case is that the Averment had been impermissible in the first instance and that it required two levels of Court proceedings (before the District Court and the Court of Criminal Appeal of the New South Wales Supreme Court) to resolve that issue. It is also crucial that in permitting an amendment to the Averment, the interests of the Defendant could be adversely affected effectively allowing a re-opening of a prosecution case by way of fresh evidence[7]. A copy of the judgment of the Court of Criminal Appeal is annexed marked **"B"**.

2. ***Walsh (as delegate of the CEO of Customs) v Allegretta and Another***

This is a decision of the Supreme Court of Western Australia reported as [1999] WASC 136 which was handed down on 19 August 1999. The matter involved prosecution of a number of parties alleging removal of goods from warehouses failure to deal with them in accordance with Customs authorisations and making false and misleading statements to Customs. As part of the prosecution, there were a number of Averments. Specific examples of these Averments are as follows.

(a) The plaintiff framed its proceedings and the relevant Averments affecting the defendant the alternative, for example that there was either the partnership between a first defendant and a second defendant (making them both liable) or the first defendant conducted business as a sole proprietor (making him liable alone)

(b) That the first defendant and/or the second defendant purchased or took delivery of cigarettes on which excise duty had not been paid.

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. As a result, the Judge came to the conclusion that the plaintiff was not assisted by the Averment provisions in establishing the case against the second defendant and dismissed the case against the second defendant.

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. The facts to which the Averment applied should have been more fully investigated and been the subject of proper pleadings. A copy of the judgement is annexed marked **"C"**.

2. ***CEO of Customs v Amron***

One example of a case in which the Averment process created problems for a Court can be found in the decision of the Supreme Court of Victoria in *CEO of Customs v Amron [2001] VSC 373* a decision handed down on 9 October 2001. In this case, Customs had averred to a number of matters. Questions where raised as to the

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[7] The decision of the Court of Criminal Appeal also referred to the High Court case of *R v Hush: Ex parte Devanny (1932) 48 CLR 487* which case involved an Averment which took 3 hours to read. In that case, Evatt J considered that it was "one of the most amazing documents in the whole history of law". If nothing else, this give some direction as to the possible size of an averment and the problems it causes for various Courts.

ability of Customs to aver to a number of those issues and the Supreme Court was required to be involved in a lengthy assessment of each and every by Customs to determine whether they were proper Averments as to facts or Averments as to the statements of intention of the defendant. Ultimately many Averments were found to be Averments as to intention of the defendant and were struck out. This took a significant portion of the time of the Court and 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. A copy of the relevant judgement is annexed marked **"D"**.

It is the view of the Committee that these cases evidence the procedural and judicial problems created by the Averment process.

In addition, to instances described above, the Committee understands that examples of other situations of alleged misuse or abuses of the Averment powers may be provided to the Inquiry.

POSITION OF THE COMMITTEE ON THE AVERMENT POWERS

The Committee makes the following observations regarding the retention and review of the Averment process.

1. First Position - Reasons to remove Averment

The position of the Committee has consistently been that the Averment process should not be retained except in very limited circumstances (see paragraph 12.9 of ALRC 60). This is also reflected in ALRC 95. However, the Committee now believes Customs powers have improved significantly and the problems associated with Averment powers have increased to the point where Averments are no longer warranted. The rationale for this conclusion comes from the following facts.

(a) As mentioned by the ALRC, the Averment process is a substantial departure from the principle of the onus lying with the prosecution. 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 (as with other areas) the balance is now weighed heavily in favour of the State.

The ongoing debate about averments tends to focus on the convenience of the prosecution and the expense to the prosecution of obtaining evidence. But the whole of that debate begs a very fundamental question. 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 [of what needs to be alleged in order to constitute the offence]. How can the prosecution satisfy itself that an offence has been committed? A person should not be charged with an offence unless the prosecution is itself reasonably satisfied, on the basis of the actual evidence, that an offence has been committed.

The Committee submits that a prosecutor cannot be satisfied about the commission of an offence without actually investigating that offence and all the elements of it. This is commonly accepted and done in all criminal prosecutions.

If that were done, it would not be necessary for the prosecution to use any averments and they can be abolished.

In summary, 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. If the prosecution first had sufficient evidence of an offence, there ought to be no need to rely on averments, and they should be abolished.

Put the other way, averments are only justified where the prosecution does not have enough evidence of an offence and wants the defendant to prove his or her innocence. This is fundamentally contrary to the Rule of Law and the standards of human rights which civilised and democratic nations extol.

As discussed above, this is found in many places such as the increased use of strict and absolute liability in the Customs Act and the enhanced audit and examination powers being granted to Customs These powers have shifted the judicial balance in favour of the State at the expense of the possible class of defendants. Accordingly, the preservation of protections (such as the onus lying with the prosecution) is vital. It is the view of the Committee that there is no longer any sound reason to depart from the general principle of the onus lying with the prosecution as with the Averment process.

(b) The Averment process is an anachronism from old English law and perceived problems in securing evidence both in Australia and overseas. The increased sophistication in the ability to audit and secure evidence and the ease of travelling overseas to secure evidence suggests that this rationale for the Averment process no longer exists.

(c) There is significant authority for the proposition that Customs prosecutions are criminal in nature which a criminal standard of proof should apply. In those circumstances, it is entirely inappropriate that the Averment procedure should apply to such prosecutions. Even should the High Court find that Customs prosecutions are civil in nature to which a civil standard of proof applies (in the manner contemplated by the *Brigginshaw* case), then such an approach recognises that Customs prosecutions are serious in nature. Again, this supports the proposition that an Averment process should not apply to such prosecutions.

(d) The Averment process unfairly disadvantages defendants in may ways, notwithstanding the technical legal "protections" to the Averment procedure in Section 255 of the Customs Act. This view is especially strong where defendants do not have access to legal advice or do not have access to sophisticated legal advice to deal with the Averment process and defendants are faced with the significant resources available to Customs. This is reflected in a number of cases involving the Averment process where it is used extensively against defendants who may be characterised as unsophisticated.

The focussing of the debate on averments to the convenience of the prosecutor and the expense to the prosecutor of obtaining evidence disguises two other critical things. First, if the prosecution finds it inconvenient or expensive to obtain some evidence before charging someone with an offence, then it might be just as inconvenient or expensive for the defendant to disprove the things averred and prove his or

her innocence. This fundamentally undermines the whole legal, democratic and civilised system of justice that has been developed over centuries. By its very nature a prosecution pits the resources of the state against the resources of an individual. That is one of the reasons that guilt of an offence invariably needs to be established beyond a reasonable doubt.

No defendant has the resources of the state at his or her disposal and it is fundamentally unfair and unjust for the defendant to have to use his or her resources to disprove the prosecutions allegations. All the more so because the prosecution finds it inconvenient or expensive to prove the allegations they make.

The second, and very serious point that has been disguised by previous debates is that the averment process effectively forces the defendant to give evidence. Again, it is a fundamental part of the Rule of Law, democracy and the system of criminal justice which has developed over centuries and to which Australia and other civilised nations ascribe, that a defendant should not be obliged to give evidence. Other, ordinary criminal proceedings do not so compel a defendant to give evidence.

(e) As contemplated by the preceding paragraph, in the majority of cases, Customs already have significant advantages in prosecutions through their significant resources and expertise. Accordingly, why should Customs also be afforded the additional advantage of not needing to prove all facts?

(f) There is a concern that Averments may be overused as an "easy option". The Committee is unaware of any particular arrangements which set out qualifying standards before the Averment process can be used (other then vague references to "prosecutorial discretion". It would seem to be a logical conclusion that given the broad nature of the Averment process and difficulties which may be experienced in undertaking research in a particular case, officers of Customs may be naturally inclined to merely aver to facts rather than exhausting all avenues to prove those facts by other means especially where they believe that a defendant is "morally" guilty".

(g) Related to the preceding comment, the Committee is concerned that the apparently availability of the Averment process may lead to its overuse and abuse. As with any prosecuting authority there is always the significant temptation to misuse powers for reasons not associated with actual guilt. There are previous examples where Customs have misused powers (ie Midford Paramount) and we understand that other examples may be produced to the Legal and Constitutional Affairs Committee. Accordingly, there needs to be special care in allocating significant powers to such authorities.

(h) The Section does not require any specific degree of knowledge or investigation before Customs can adopt the Averment process. It would appear that Customs may aver without need to reach the evidential standards for prosecution usually required by a prosecutor.

(i) From a review of a number of recent reported cases, the Committee is of the view that the Averment power creates significant procedural difficulties for Courts. In these cases Courts have had to take significant time to review Averments made by Customs officers to determine whether they have been properly made as to facts rather than to statements of intention.

The confusion and costs of such cases far exceeds any merits for the Averment process.

(j) It is the concern of the Committee that there appear to be no penalties available against officers of Customs who aver to matters which actually go to the intention of the defendant (not to facts) or aver to matters without any real belief or investigation as to the statements contained by the Averment process. The absence of such penalties or remedies against officers gives officers no cause to properly consider the application of the Averment process.

Accordingly, given the concerns regarding the Averment process, the Committee is of the view that the Averment provisions should be removed in their entirety and Customs, like any other prosecuting authority, should be obliged to prove according to proper evidential grounds statements of facts made in prosecutions.

2. *Second Position - Retain Averment in a more limited form*

Notwithstanding the strong position of the Committee as set out above and recorded in the various ALRC Reports, the Committee recognises that Parliament may not support the total abolition of the Averment process.

However, based on the comments of the Committee and the ALRC, it is clear that the Averment process requires Legislative review. Even putting the Committee position to one side, it seems pointless for Government to commission Reports by the ALRC and continue to ignore its recommendations such as those in ALRC 60 and ALRC 95 regarding review of the Averment process.

Accordingly, the Committee believes that even should the Averment process be retained in some form, that format should be 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. Further, in making a determination as to whether Averments should be disallowed, the Committee also endorses (as a starting point) the criteria set out in ALRC No. 60 as also identified in paragraph 13.48 of ALRC No.95 a copy of which is annexed marked **"E"**.

In addition to these criteria, the Committee believes that the retention of any Averment process should also incorporate creation of guidelines setting out where Averments can be made which penalise Customs officers who aver to matters where an Averment is deliberately/improperly made or made without grounds to believe it is correct. Further, as a consequence of these conclusions, the Committee also believes that a defendant should be able to cross examine an officer of Customs who averts to establish whether the Averment has been correctly undertaken. This would go beyond merely characterising whether an Averment is a fact or an intention. The recommendations are set out in paragraph 3 below.

3. *Recommendation for criteria for the Second Position*

Accordingly, drawing upon the ALRC criteria and the Committee views described above, the Committee believes that the following arrangements should apply to the Averment process.

(a) In conjunction with interested parties, Customs should develop a set of Guidelines (to be a Disallowable Instrument) identifying situations in which Averments should be allowed and the manner in which averments should be drawn. This approach is consistent with the comments of the ALRC in

paragraph 12.11 of ALRC 60. These Guidelines should set out the procedure before any Averment may issue. For example, only a suitably trained delegate of the CEO of Customs should be authorised to make any Averment and should only be made where the facts behind the Averment are sufficient to satisfy a prosecutor that they would support a prosecutor. Other criteria for Averments could draw upon those set out in paragraph 7.16 (sub paragraph (c)) of the 1982 Report by the Senate Standing Committee on Constitutional and Legal Affairs (referred to above).The Guidelines should be binding on Customs.

(b) Consistent with ALRC 60 and ALRC 95, Section 255 of the Customs Act should be amended to allow a Court to disallow a proposed Averment, adopting the following criteria.

(i) Whether the Averment relates to a matter that is merely formal and is not substantially in dispute.

(ii) Whether the prosecutor is in a position to adduce evidence and if not whether the difficulty derives from overseas or the obtaining of evidence would result in undue cost or delay.

(iii) Whether the defendant is reasonably able to obtain information or evidence above the matter.

(iv) What admissions the defendant has made.

(v) Whether Guidelines have been observed.

(c) Any Averment should be to specific events rather than relying on a general concluding statement that "I aver to those matter to I am entitled to aver". The current "scatter gun" approach adopted by Customs in Averments should not be permitted.

(d) In any application to disallow an Averment (whether pursuant to paragraph (b)) or due to concerns that it has otherwise been improperly made, the defendant should be able to cross-examine Customs officers as to their Averment and compliance with Guidelines.

(e) There should be recourse against Customs for failure to observe their Guidelines or where it is established that Customs have averred contrary to Section 255 of the Customs Act. The Averment Power should not be utilised in circumstances in which the swearing of Averments constitutes nothing more than an attempt to disguise a lack of evidence in relation to the matter averred (ie circumstances in which the Averment itself is the only evidence of wrongdoing on the party accused). In these situations, Averments admitted into evidence which are subsequently shown to be false should be subject to the same criminal sanctions that apply to the other kinds of perjured evidence. For example, if an officer of Customs (or other officer of another Government authority) swears an Averment and knows it to be false, or swears it with reckless indifference as to its truth or accuracy, that officer should face criminal charge of perjury. Further, if two or more officers collaborate in the swearing of an Averment shown to be false, those officers should be charged with conspiring to pervert the course of justice.

CONCLUSION

A proper justice system needs to maintain a fine balance between the rights of prosecutors and defendants. The system must have, at its heart, the requirement that a prosecutor has the onus to prove their case and the no procedure should unfairly disadvantage defendants. Any departure should only arise in very limited circumstances where public benefit clearly exceeds perceived disadvantages. Given the seriousness of Customs prosecutions, the procedural advantages of absolute and strict liability and the realities of the relative resources available to prosecutors and defendants, the Committee is of the view that the alleged rationale for Averment do not support the continued departure from the general public.

For the reasons set out above, the Committee is of the view that the Averment provisions should not be retained in the Customs Act. The Averment process provides Customs with an unfair advantage in Customs prosecutions which can have significant and adverse consequences to the defendant. Further, the nature of the Averment process creates significant difficulties for Courts in determining whether Averment has been properly undertaken the costs of which exceed any alleged benefits. It is also inconsistent to normal concepts that a prosecuting authority should merely be able to aver to certain factual situations rather than being obliged to prove them. There is no apparent public benefit which outweighs these disadvantages. Accordingly, for these reasons, the Committee believes that the Averment provisions should be removed altogether. However, the Committee recognises that even should Parliament not recommend that the Averment power be removed, then it should be subject to significant restrictions of the type contemplated by the ALRC and as further restricted in the manner described above by the Committee.

The Committee welcomes the opportunity for its members to make further submissions and ask questions regarding the Averment process.

ANNEXURE A

Sections 1615 and 535 of the United States Customs Legislation

Sec. 535. Compulsory production of books, invoices, or papers

In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the Government, whenever, in his belief, any business book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.

(June 22, 1874, ch. 391, Sec. 5, 18 Stat. 187.)

Sec. 1615. Burden of proof in forfeiture proceedings

In all suits or actions (other than those arising under section 1592 of this title) brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel,

vehicle, or aircraft, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

(June 17, 1930, ch. 497, title IV, Sec. 615, 46 Stat. 757; Aug. 5, 1935, ch. 438, title II, Sec. 207, 49 Stat. 525; Pub. L. 95-410, title I, Sec. 110(d), Oct. 3, 1978, 92 Stat. 896; Pub. L. 98-473, title II, Sec. 321, Oct. 12, 1984, 98 Stat. 2056; Pub. L. 98-573, title II, Sec. 213(a)(13), Oct. 30, 1984, 98 Stat. 2987.)

ANNEXURE B

Judgment of Neil Pearson & Co Pty Ltd and Another v Comptroller-General of Customs

A

NEIL PEARSON & CO PTY LTD AND ANOTHER v COMPTROLLER-GENERAL OF CUSTOMS

Court of Criminal Appeal: Kirby A-CJ, Allen J and Dowd J

1 March, 24 July, 1 December 1995

B *Customs and Excise — Customs duties — Offences — False and misleading statements — Tariff classification in issue — Prior determination in proceedings for recovery of duties — Determination not preclusive — Customs Act* 1901 (Cth), s 234(1)(d).

Estoppel — Judgment in rem — Prior civil proceedings — Recovery of customs duties in Federal Court — Subsequent prosecution for making false and misleading statements — Tariff classification findings of Federal Court — C *Whether binding upon District Court in criminal appeal — Findings not decisive as to status or disposition of goods.*

Precedents — Federal Court of Australia — Binding effect of decisions — Findings in civil proceedings relating to tariff classification — May be followed in District Court criminal proceedings relating to same goods.

Criminal Law — Criminal liability and capacity — Creation of absolute D *offence — Particular offences — Customs duties — False declarations — Customs Act,* s 234(1)(d).

The *Customs Act* 1901 (Cth), s 234(1)(d), provides that a person shall not:

"(d) knowingly or recklessly:

(i) make a statement to an officer that is false or misleading in a material particular; or

E (ii) omit from a statement made to an officer any matter or thing without which the statement is misleading in a material particular."

In civil proceedings for recovery of tariffs in respect of imported washing machines under the *Customs Tariff Act* 1982 (Cth), the Federal Court of Australia, on appeal from the Administrative Appeals Tribunal, determined the appropriate tariff classification for particular washing machines.

F In later criminal proceedings in the District Court of New South Wales alleging breaches of s 234(1)(d) of the *Customs Act* in relation to the same washing machines, the tariff classification of the machines was a matter for determination.

On a case stated as to, inter alia, the relevance of the Federal Court determinations to the criminal proceedings,

Held: (1) The prior judgment of the Federal Court did not constitute a decision in rem; its decision on tariff classification of the machines decided the level of G customs duty payable upon importation; it did not constitute a "decision as to the status or disposition" of those goods. (457C)

Wik Peoples v State of Queensland (1994) 49 FCR 1; *State of Queensland v Commonwealth* (1987) 162 CLR 74; *Attorney-General of New South Wales v Collector of Customs for New South Wales* (1908) 5 CLR 818 (the "Steel Rails" case), followed.

(2) The District Court was entitled (though not bound) to be persuaded by the

prior findings of the Federal Court despite those findings not being of preclusive effect. (457G-458D) A

R v Hush; Ex parte Devanny (1932) 48 CLR 487, applied.

(3) The *Customs Act* 1901 (Cth), s 234(1)(d), creates an absolute offence. (464C)

Sternberg v The Queen (1953) 88 CLR 646; *Falstein, Ex parte; Re Maher* (1948) 49 SR (NSW) 133; *Davidson v Watson* (1953) 28 ALJ 63, applied.

Note: B

A Digest (3rd ed) — TAXES AND DUTIES [296]; CUSTOMS AND EXCISE [36], [46], [48]; ESTOPPEL [23]; PROCEDURE [57]; CRIMINAL LAW [17]

CASES CITED

The following cases are cited in the judgments:

Adelaide Steamship Co Ltd v The Commonwealth (1912) 15 CLR 65

Attorney-General of New South Wales v Collector of Customs for New South Wales (the "Steel Rails" case) (1908) 5 CLR 818 C

Blair v Curran (1939) 62 CLR 464

Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853

Davidson v Watson (1953) 28 ALJ 63

Falstein, Ex parte; Re Maher (1948) 49 SR (NSW) 133

Healy; Ex parte (1903) 3 SR (NSW) 14

Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537

Hunter v Chief Constable of the West Midlands Police [1982] AC 529 D

Jackson v Goldsmith (1950) 81 CLR 446

Killick v The Queen (1981) 147 CLR 565

Lawrence v The Queen (1981) 38 ALR 1

May v O'Sullivan (1955) 92 CLR 654

Murphy v Farmer (1988) 165 CLR 19

Neil Pearson & Co Pty Ltd v Collector of Customs (1990) 12 AAR 172; 21 ALD 62

Peacock v Zyfert (1983) 77 FLR 471 E

R v Hush; Ex parte Devanny (1932) 48 CLR 487

R v Storey (1978) 140 CLR 364

R v Wilkes (1948) 77 CLR 511

Rogers v The Queen (1994) 181 CLR 251

Schenker & Co (Aust) Pty Ltd v Sheen (Collector of Customs) (1983) 77 FLR 127

Shaw v The Queen (1952) 85 CLR 365

State of Queensland v Commonwealth (1987) 162 CLR 74 F

Sternberg v The Queen (1953) 88 CLR 646

Wik Peoples v State of Queensland (1994) 49 FCR 1

Wilson v Chambers & Co Pty Ltd (1926) 38 CLR 131

No additional cases were cited in argument.

STATED CASE

This was the hearing of a case stated by Hosking DCJ of the District Court G hearing an appeal against convictions in the Local Court for offences under s 234(1) (d) of the *Customs Act* 1901 (Cth).

T M Healey, for the appellant.

P Roberts, for the respondent.

Cur adv vult

1 December 1995

KIRBY A-CJ. The present proceedings arise out of a case stated by Hosking DCJ for the determination of this Court. His Honour was hearing an appeal from a decision of the Local Court wherein the appellants had each been convicted in respect of fourteen charges brought against each of them under the *Customs Act* 1901 (Cth) (the Act), s 234(1)(d). Section 234(1) provides as follows:

> "Customs offences
> 234. (1) A person shall not:
> (a) Evade payment of any duty which is payable;
> (b) Obtain any drawback, refund, rebate or remission which is not payable;
> (d) knowingly or recklessly:
> (i) make a statement to an officer that is false or misleading in a material particular; or
> (ii) omit from a statement made to an officer any matter or thing without which the statement is misleading in material particular;
> (g) Refuse or fail to answer questions or to produce documents;
> (h) Sell or offer for sale, any goods upon the pretence that such goods are prohibited imports or smuggled goods."

Pursuant to s 5B of the *Criminal Appeal Act* 1912, Hosking DCJ stated four questions for the opinion of this Court.

The importation of certain machines by the appellants:

It is convenient to begin with a statement of the background facts. The charges laid against the appellants relate to seven separate importations into Australia of Maytag A512 washing machines. These occurred between 30 July 1986 and 31 January 1987. Neil Pearson & Co Pty Ltd (the first appellant) was the company responsible for the importation of the subject machines. Mr Neil Pearson (the second appellant) was a director of the company. He was also the officer of the company responsible for causing the subject machines to be imported into Australia from the United States of America.

At the time of the importation of the machines, the relevant tariff legislation was the *Customs Tariff Act* 1982 (Cth) (the Tariff Act). Schedule 3 of the Tariff Act set out the general and special rates of duty applicable to various items. Machines such as those presently in question are dealt with in Chapter 84 which covers "boilers, machinery and mechanical appliances; parts thereof". At the relevant times, the notes at the commencement of the Chapter included the following:

> "5. (1) For the purposes of this Chapter, a machine that has one principal purpose and other subsidiary purposes shall be treated as if its principal purpose were its sole purpose."

Item 84.40 dealt with various types of machines. It included:

> "84.40.1 — Laundry machines, including tumble dryers, manually operated pressing machines, washing and cleaning machines and garment formers (finishers), being machines of a kind used for domestic purposes
> ...
> 84.40.2 — Machines, NSA, as follows:

...

(d) laundry and dry-cleaning machinery and appliances, as follows:
(i) drying tumblers;
(ii) flatwork folding machines;
(iii) garment formers (finishers) of the cabinet type;
(iv) ironing machines;
(v) mechanically operated pressing machines;
(vi) squeeze type extractors;
(vii) spotting and steaming tables;
(viii) washing or cleaning machines

84.40.9 — Other."

At the relevant times the rate of duty in respect of machinery falling within 84.40.2 was 15 per cent. However, if the machinery fell within the terms of Tariff Concession Order 8530085 (the TCO), the rate of duty was taken from item 50. Then it was only 2 per cent. The TCO was in the following terms:

"84.40 Laundry equipment, being goods to which sub-item 84.40.2 applies, being any of the following:
(a) washing machines;
(b) washer extractors;
(c) tumble dryers;
having a dry linen capacity NOT less than 10 kg/batch.

NOTE:
For the purposes of this Order, "dry linen capacity" shall be determined:
(a) in respect of washing machines and washer extractors, by the application of a divisor of 10 to volumetric cylinder capacity expressed in L [ie litres]; and
(b) in respect of tumble dryers, by the application of a divisor of 25 to volumetric cylinder capacity expressed in L."

The case stated:

It is now convenient to set out the detail of the case stated by Hosking DCJ for the consideration of this Court. His Honour set out a summary of his findings on the evidence, the contentions of the appellants, his own holdings of law, and the questions for determination by this Court.

Hosking DCJ summarised his findings on the evidence as follows:

(1) Mr Pearson was a director of the company;

(2) On the specified dates the company imported into Australia Maytag A512 washing machines;

(3) Mr Pearson was the officer of the company responsible for causing the subject machines to be imported from America;

(4) On the basis of the averment 6 in the informations, the subject machines had a dry linen capacity of less than 10 kg/batch.

(5) In relation to the subject machines a claim was made in Entries for Home Consumption that Tariff Concession Order 8530085 applied and that the duty rate for the machines was 2 per cent;

(6) Duty was paid in respect of the subject machines at the rate of 2 per cent;

(7) Mr Pearson was aware at the time of the importations that there was a real question whether the TCO could apply to the subject machines. Mr Pearson caused the Entries for Home Consumption to claim the TCO and 2 per cent

A duty in the knowledge that there was a real risk that the TCO did not apply and that the correct rate of duty was higher than 2 per cent;

(8) Mr Pearson caused altered advertising brochures to accompany the Entries for Home Consumption submitted to Customs. Mr Pearson altered the brochures by cutting out the word "domestic" which originally appeared in them as a description of the subject machines. Mr Pearson did this to disguise the fact that the subject machines may have been classifiable as domestic B washing machines thereby attracting a 30 per cent rate of duty with the TCO having no application as the TCO could only apply to non-domestic machines; and

(9) The subject machines were the subject of proceedings numbered G717 of 1989 in the Federal Court of Australia and on appeal to the Full Court numbered G386 of 1990.

The contentions of the appellants, as set out in the stated case, were:

C (1) that the decision of Wilcox J and the Full Federal Court were irrelevant to the question of Tariff Classification of the subject machines because they were decisions of a civil court applying a civil standard of proof;

(2) that Hosking DCJ should find that the subject machines were "washer extractors" and that washer extractors were not classifiable to item 84.40.2 but to Item 84.40.9 thereby attracting a 2 per cent rate of duty;

(3) that if the subject machines were classifiable to item 84.40.2, the TCO applied; and

D (4) that s 234(1)(d) of the Act did not create an absolute offence.

Hosking DCJ found that the offence had been proved in each case. Accordingly he considered that the appeals should be dismissed. He summarised his holdings of law in the stated case as follows:

(1) The subject machines were non-domestic commercial washing machines and therefore properly classified to item 84.40.2 of Schedule 3 to the *Customs Tariff Act* 1982 (Cth), thereby attracting a duty rate of 15 per cent. His Honour E so held following the decisions of Wilcox J and the Full Federal Court in *Neil Pearson & Co Pty Ltd v Collector of Customs* (1990) 12 AAR 172; 21 ALD 62 as to the proper classification of the subject machines;

(2) The TCO did not apply to the subject machines because:

(a) The subject machines had a dry linen capacity of less than 10 kg/batch; and

F (b) The decisions of Wilcox J and the Full Federal Court had held that the TCO was inapplicable to the subject machines;

(3) An offence against s 234(1)(d) of the Act, as it stood at the time of the offences, was an absolute offence;

(4) An offence against s 234(1)(a) of the Act required proof of a mental element as referred to by Isaacs J in *Wilson v Chambers & Co Pty Ltd* (1926) 38 CLR 131 at 144; and

G (5) By reason of his findings of fact and holdings of law all of the offences had been proved beyond reasonable doubt.

Before Hosking DCJ finally disposed of the proceedings and turned to consider the penalties which followed convictions upon the foregoing findings, counsel then appearing for the appellants asked his Honour to state a case for the opinion of this Court. His Honour formulated the questions for determination in the following form:

"The questions for determination by the Court of Criminal Appeal are whether:

(a) I erred in holding that Tariff Concession Order No 8530085 did not apply to the subject washing machines;

(b) I erred in following the decisions of Wilcox J and the Full Federal Court of Australia in *Neil Pearson & Co Pty Ltd v Collector of Customs*;

(c) I erred in holding that the subject washing machines were properly classified to item 84.40.2 of the Schedule 3 to the *Customs Tariff Act* 1982; and

(d) I erred in holding that s 234(1)(d) of the *Customs Act* 1901 created an absolute offence."

The issues before this Court:

As to the first three of the four questions stated for determination by this Court, the proceedings have largely been directed to the issue of whether there was sufficient evidence before Hosking DCJ to justify the conclusions which he reached. The respondent made a deliberate choice to rely only on two matters. First, it submitted that the decisions by Wilcox J and the Full Federal Court were of preclusive effect. That is, the respondent alleged that Hosking DCJ was bound to follow the conclusions reached in the Federal Court decisions, namely that the TCO did not apply to the subject machines, and that the subject washing machines were properly classified by reference to item 84.40.2 of Schedule 3 to the *Customs Tariff Act* 1982 (Cth). Secondly, the respondent relied on certain averments in the informations laid against the appellants. In particular, the respondent relied on averment 6 in the informations, which read:

"6. Each of the washing machines in the goods contained a dry linen capacity of less than 10 kg/batch;"

It is not in issue that the TCO only applies to machines which have a dry linen capacity of not less than 10 kg/batch. Hence the respondent submitted that averment 6 was evidence that the TCO did not apply to the subject machines.

The appellants challenged both the force and admissibility of both the Federal Court decisions and averment 6. Detailed arguments were presented by both sides on these issues. It is therefore necessary now to analyse both the effect of the Federal Court decisions and the subject averment.

The civil proceedings in the Administrative Appeals Tribunal and the Federal Court of Australia:

The civil proceedings between the first appellant and the respondent commenced in the Administrative Appeals Tribunal, which was constituted by Mr C J Bannon QC, Deputy President (as Bannon J then was). The Deputy President held that the machines fell within sub-item 84.40.1. Thus it was not necessary for him to consider whether the TCO applied, since the TCO only applied to machines which fell within sub-item 84.40.2. However, Deputy President Bannon did consider the issue. He concluded that the TCO could not have applied since the machines could not properly be described as having a dry linen capacity of not less than 10 kg per batch.

The first appellant then appealed from the decision of Deputy President Bannon to the Federal Court of Australia. It challenged the Deputy President's interpretation both of Schedule 3 of the Tariff Act and the TCO. Appeals from the Administrative Appeals Tribunal to the Federal Court of Australia are

limited to the correction of errors of law: see *Administrative Appeals Tribunal Act* 1975 (Cth), s 44 (1). The appeal was heard by Wilcox J. His Honour delivered his judgment on 27 June 1990. He upheld the appeal in part, finding that the subject machines were properly classified pursuant to sub-item 84.40.2 and not sub-item 84.40.1. However, Wilcox J further held that the machines were not entitled to the benefit of the TCO. His Honour concluded that the relevant "cylinder", to be considered in the application of formula dictated by the TCO, was the inner basket of the machines, and not the surrounding container. It was clear that, if the inner basket of the machines was the relevant "cylinder", then the application of the formula produced a figure of less than 10 kg per batch. Thus, the machines were outside the scope of the TCO.

The first appellant further appealed from the decision of Wilcox J to the Full Court of the Federal Court of Australia. It submitted that Wilcox J had erred in selecting the inner spin-drying basket as the appropriate "cylinder" in application of the TCO rather than the outer container. The only issue in the appeal was whether the TCO should have been held to apply to the machines. The Full Court (Morling J, Einfeld J and Foster J) dismissed the appeal. The Court determined that the machines should properly be characterised as "washer-extractors" and not "washing machines". The Court, in a joint judgment, stated that:

> "The machine, as a washer extractor, receives the load for the purpose not only of washing it but also of spin-drying it. The load can be received for these purposes only by its being placed in the spin-drying basket. In our view, it is not to the point that, if the spin drying apparatus were removed, a load of different size could be placed within the confines of the watertight outside container and, presumably, be subjected to an ordinary washing process inside that container. It is clear that this was simply not the way the machine was intended to function nor the relevant tariff provisions to have effect. Accordingly, we are satisfied that the appropriate "cylinder" for measurement and calculation was the spin-drying basket."

The relevance of the civil proceedings to this case:

At the commencement of the Local Court proceedings for criminal offences alleged against the appellants, counsel for the respondent submitted that the Federal Court proceedings had preclusive effect. That is, it was argued that the appellants should not be permitted to contest, in the criminal proceedings, the correctness of the conclusions reached in the Federal Court, namely, that the TCO did not apply, and that the machines were properly classifiable under sub-item 84.40.2. It appears that this submission was successful before the Local Court. The respondent repeated this submission when the case was brought before Hosking DCJ. His Honour noted the submission when holding that there existed a prima facie case for the appellants to answer. The transcript of that ruling was placed before this Court and referred to without objection. This is what Hosking DCJ there said:

> "Tariff Classification is a matter of law. Mr Roberts [counsel for the respondent] submitted that that had been determined in a fashion which bound the parties by the Full Federal Court and could not be re-agitated before me. I find it unnecessary to rule upon that matter at this stage, suffice it to say that in determining the matter of tariff classification for

myself I derive great benefit from the Federal Court decisions. If one sitting at this level may say so without impertinence, I am in respectful agreement with the decision of the Federal Court and apply it."

Hosking DCJ also referred to this issue in his reasons for decision which accompanies his case stated for the opinion of this Court:

"A question arose as to the legal effect of the Full Court's decision. Mr Roberts submits that it concludes for all time the issue of the non application of the TCO and that it binds these appellants. He made a deliberate decision to call no evidence on that issue before me relying on the TCO and averment 6 ... As I indicated (transcript page 5) my initial inclination was to simply follow and apply the Federal Court's decision.

It is not a question of me deciding whether or not to follow what is a unanimous decision of the Full Federal Court. In the absence of binding authority to the contrary judges sitting at my level of the judicial hierarchy should respect and follow the decisions of superior courts of the standing and authority of the Federal Court."

In argument before this Court, counsel for the respondent maintained that the Federal Court decisions were binding on the issues of tariff classification and the application of the TCO. He relied on three main bases for this submission. They were, that the doctrine of issue estoppel applied; that the decisions of the Federal Court were decisions in rem; and that it would be an abuse of the process of the Court to allow the decisions to be challenged.

The preclusive effect of prior judicial determinations:

Issue estoppel and the abuse of process arguments advanced by the respondent have traditionally been considered to be forms of "estoppel by record": see *Cross on Evidence*, 4th Australian ed (1991) Chapter 3. The other major manifestation of estoppel by record is the doctrine of res judicata. The concept of decisions in rem is closely related to these doctrines.

As the phrase "estoppel by record" suggests, the doctrine initially operated only on decisions of courts of record. Since this is clearly no longer the case, there have been calls for a change of semantics. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 933-934, Lord Guest stated that:

"... as it is now quite immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decisions, this nomenclature has disappeared and it may be convenient to describe res judicata in its true and original form as 'cause of action estoppel'."

While there is some force in this view, it has not been universally adopted. Both phrases, "res judicata" and "cause of action estoppel", are commonly used, and they are now interchangeable.

The original form of estoppel by record is res judicata. This preclusive rule was expressed by Fullagar J in *Jackson v Goldsmith* (1950) 81 CLR 446 in the following terms (at 466):

"The rule as to *res judicata* can be stated sufficiently for the present purposes by saying that, where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action."

Res judicata thus operates so that, once a cause of action between certain parties has been finally determined by a competent tribunal, neither of those

A parties can challenge the adjudication in subsequent litigation between them. This is because "the very right or cause of action claimed or put in suit has ... passed into judgment, so that it is merged and has no longer an independent existence ...": see *Blair v Curran* (1939) 62 CLR 464 at 532, per Dixon J. Res judicata has two effects. First, it prevents the successful party from re-litigating the same cause of action. Secondly, it prevents the unsuccessful party from denying the correctness of the decision reached by the initial tribunal.

B The second manifestation of estoppel by record is issue estoppel. Unlike res judicata which operates so as to prevent the bringing of a cause of action which has previously been definitively determined in a suit at law, the plea of issue estoppel asserts that a relevant issue or matter has been decided by a prior action. Thus, the two concepts are closely aligned. The only difference lies in whether the issue said to have been resolved constituted the tribunal's formal conclusion, or whether the issue was subsidiary to, or underlay the conclusion.

C The term "issue estoppel" appears to have been coined by Higgins J in his dissenting judgment in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537: see Spencer Bower and Turner, *The Doctrine of Res Judicata*, 2nd ed (1969), at 150. His Honour (at 560-561) stated:

> "I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already
>
> D been decided (I may call it 'issue-estoppel'). As stated by Lord Ellenborough in *Outram v Morewood* [3 East, at p 355], 'the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.' In the cases relating to *res judicata* in the former and stricter sense — a decision as to the same cause
>
> E of action — it seems clear that the verdict and judgment are conclusive, not merely as to the points actually taken, but also as to points which *might* have been taken (*Henderson v Henderson* [3 Ha 100, at p 115]; *Hall v Levy* [LR 10 CP, 154]). But in the case of what I call 'issue-estoppel' it must appear that the precise issue was previously taken." (Emphasis in original.)

F The third, and most limited form of estoppel by record, occurs when a court prevents a party from litigating an issue because to do so would amount to an abuse of process. This mechanism will most often be employed where, although not technically bound by an earlier determination, a party should, in substance, be so adjudged. An example of the application of this principle can be found in the case of *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. In that case a number of accused was charged with murder. During their trial, they challenged the voluntariness of statements containing admissions which they had allegedly made during police interviews, claiming

G that they had been assaulted by the police officers. The trial judge admitted the evidence and the accused were convicted. They subsequently brought a civil action against the police officers seeking damages for assault. The House of Lords dismissed their claims. Although they rejected the argument that issue estoppel operated, the Law Lords held that the action was an abuse of process. Lord Diplock, with whom the other Law Lords agreed said, (at 541):

"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

This conception of abuse of process in the context of criminal proceedings was recently considered by the High Court of Australia in *Rogers v The Queen* (1994) 181 CLR 251. In that case, the appellant had been tried before the District Court on four counts of armed robbery. After a voir dire, the trial judge concluded that the records of interview upon which the Crown had sought to rely were not admissible as he was not satisfied that the appellant had made them voluntarily. He directed verdicts of acquittal which were entered and he discharged the appellant. The appellant was subsequently presented for trial on further charges of armed robbery. At the second trial, the Crown again sought to tender the records of interview as relevant to four of the counts of armed robbery. The appellant sought a permanent stay of the proceedings on the ground that their continuation would be an abuse of process. The High Court held, by majority, that the Crown could not rely on the records of interview. Mason CJ, Deane J and Gaudron J held that the attempt by the Crown to re-open the issue of the voluntary nature of the admissions constituted an abuse of the process of the court. Mason CJ noted (at 255), that abuse of process could not be strictly defined:

"... The concept of abuse of process is not confined to cases in which the purpose of the moving party is to achieve some foreign or ulterior object, in that it is not that party's genuine purpose to obtain the relief sought in the second proceedings. The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories .... Likewise, it would be a mistake to treat the discussion in judgments of particular circumstances as necessarily confining the concept of abuse of process."

Mason CJ concluded (at 256-257) that the prosecution's conduct in that case constituted an abuse of process:

"... Re-litigation in subsequent criminal proceedings of an issue already finally decided in earlier criminal proceedings is not only inconsistent with the principle that a judicial determination is binding, final and conclusive (subject to fraud and fresh evidence), but is also calculated to erode public confidence in the administration of justice by generating conflicting decisions on the same issue. These considerations necessarily prevail over any competing public interest in the securing of convictions against the appellant."

The other members of the majority on this issue in the High Court, were Deane J and Gaudron J. In a joint judgment, their Honours concluded that (at 280):

"... tender of the records of interview constitutes a direct challenge to the [earlier] determination which was a final determination, or became so, once verdicts were returned. The challenge is one which invites 'the scandal' of conflicting decisions [Spencer Bower and Turner, *The Doctrine of Res Judicata* (2nd ed, 1969) at 411]. And it jeopardises public confidence in the administration of justice: in a context where the onus of

A proof would be the same and where there is no claim of 'fresh evidence' or fraud, a determination that the confessions were made voluntarily would undermine the incontrovertible correctness of the verdicts of acquittal returned [at the earlier trial] ...."

Therefore, it is apparent that there are at least three manifestations of estoppel by record which operate, in certain circumstances, to give preclusive effect to prior judicial determinations. However, it would be wrong to see these B three concepts as entirely distinct legal principles. They are founded on similar policy considerations. It has generally been thought that res judicata and issue estoppel are founded on two important precepts. First, is the undoubted value of finality in litigation. This principle is expressed by the Latin maxim interest rei publicae ut sit finis litium (It is in the public interest that there should be an end to litigation.) In *Rogers* (at 273), Deane J and Gaudron J stated that this maxim "... expresses the need, based on public policy, for judicial determinations to be final, binding and conclusive". The second basis for the rule is the accepted C principle that no person should be harassed twice for the same cause, nemo debet bis vexari pro eadem causa. According to Deane J and Gaudron J (at 273), this maxim:

> "... looks to the position of the individual and reflects the injustice that would occur if he or she were required to litigate afresh matters which have already been determined by the courts."

In *Jackson v Goldsmith* (at 466), Fullagar J expressed the opinion that res D judicata was not "correctly classified under the heading of estoppel at all" but was a "broad rule of public policy" based on the foregoing maxims. In *Rogers*, Deane J and Gaudron J went further. Their Honours cited a third, related precept. This is the principle res judicata pro veritate accipitur. They state that this maxim (at 273):

> "... gives expression to a rule of Roman law which has since been recognised as part of our common law. It expresses the need for decisions E of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct ... [the] principle is not only fundamental, it is essential for the maintenance of public respect and confidence in the administration of justice ....
>
> From earliest times, the principle embodied in the maxim res judicata pro veritate accipitur has been seen as necessary to protect against 'the scandal of conflicting decisions' [Spencer Bower and Turner, at p 411]."

F Furthermore, Deane J and Gaudron J employed this third principle to draw together the various manifestations of what has been traditionally termed "estoppel by record" (at 273-274):

> "... Issue estoppel and res judicata or cause of action estoppel are mechanisms which protect against conflict of that kind [ie conflicting decisions]. However, the principle has an existence beyond those mechanisms so that, for example, it is an abuse of process to mount a collateral attack in civil proceedings on an earlier decision in a criminal G trial. At least that is so unless there is a less onerous burden of proof or there is fresh evidence or proof of fraud."

Their Honours concluded that not only was res judicata not a true estoppel, as had been foreshadowed by Fullagar J, but that it was also incorrect to identify issue estoppel as a true estoppel. They stated (at 274-275), that:

> "... [Issue estoppel] is justified by the same policy considerations that

Catchwords:

Customs Act - Offences - Removal of goods from bonded warehouses and failure to deal with them in accordance with the Customs authorisation - Turns on own facts

Legislation:

Excise Act 1901 (Cth)
Customs Act 1901 (Cth)
Crimes Act 1914

Result:

Judgment for plaintiff against first defendant
Claim against second defendant dismissed

Representation:

CIV 1883 of 1997

Counsel:

Plaintiff	:	Ms L B Price
First Defendant	:	In person
Second Defendant	:	In person

Solicitors:

Plaintiff	:	Australian Government Solicitor
First Defendant	:	In person
Second Defendant	:	In person

CIV 1157 of 1998

Counsel:

Plaintiff	:	Ms L B Price
First Defendant	:	In person
Second Defendant	:	In person

Solicitors:

Plaintiff	:	Australian Government Solicitor
First Defendant	:	In person
Second Defendant	:	In person

Case(s) referred to in judgment(s):

L Vogel & Son Pty Ltd v Anderson (1969-1970) 120 CLR 157
R v Raso (1993) 68 A Crim R 495

Case(s) also cited:

Chullani v Chief Executive Officer of Customs, unreported; SCt of WA; Library No 960660; 15 November 1996
Collector of Customs (NSW) v Southern Shipping Co Ltd (1962) 107 CLR 279
Collector of Customs (Vic) v Wilh Wilhelmsen Agency Pty Ltd (1956) 102 CLR 147
Goben Pty Ltd v Chief Executive Officer of Customs (1997) 149 ALR 102
Ha v State of New South Wales (1997) 189 CLR 465
Hansen v Comptroller-General of Customs, unreported; SCt of NSW; Smart J; 1 March 1996
Jolley v Commissioner of Taxation (Cth) (1989) 86 ALR 297
Keith Spicer Ltd v Mansell [1070] 1 WLR 333
Ludwigs Canberra Bond Cellar Pty Ltd v Sheen (1982) 65 FLR 347
Minister for Immigration, Local Government & Ethnic Affairs v Dela Cruz (1992) 34 FCR 348
R v Don Santos (1995) 80 A Crim R 350
Wilson v Chambers & Co Pty Ltd (1926) 38 CLR 131

1 **WHITE J**: These two cases were heard together, the plaintiff in CIV 1157 of 1998 relying upon the evidence given in CIV 1883 of 1997.

CIV 1183 of 1997

2 In CIV 1883 of 1997, the plaintiff claims penalties in respect of a number of alleged offences against the *Excise Act 1901* (Cth) and the *Customs Act 1901* (Cth) respectively.

3 The claims, which are set out in the 777 paragraphs of the statement of claim, relate to:

(a) 35 alleged offences of contravening s 61 of the *Excise Act 1901* between 24 January 1994 and 19 July 1995, 35 alleged offences against s 114D(1)(a) of the *Customs Act 1901* between the same dates,

(b) 35 alleged offences against s 116(2)(a) of the *Customs Act 1901* between the same dates, and

(c) 35 alleged offences against s 234(1)(d)(i) of the *Customs Act 1901* between 24 January 1994 and 22 June 1995.

Section 61 of the *Excise Act 1901* provides:

"**61.** All excisable goods are, until delivered for home consumption or for exportation to a place outside Australia, whichever first occurs, subject to the control of Customs and must not be moved, altered or interfered with except as authorised by this Act."

4 Section 114D(1)(a), s 116(2)(a) and s 234(1)(d)(i) of the *Customs Act 1901* provide:

"**114D Goods to be dealt with in accordance with export entry**

(1) The owner of goods in respect of which an export entry has been communicated to Customs:

(a) must, as soon as practicable after an authority to deal with the goods is granted, deal with the goods in accordance with the entry; and ... "

"(2) Where an authority to deal with goods entered under section 114 is taken, under subsection (1), to have been totally or partially revoked, the owner of the goods must, within 7 days after the end of the period referred to in that subsection:

(a) if the authority to deal was taken to be totally revoked -
withdraw the entry relating to the goods; and ... "

and

"**234 Customs offences**

(1) ...

(d) knowingly or recklessly:

(i) make a statement to an officer that is false or misleading in a material particular; or ... "

5 The first defendant was at all material times the registered sole proprietor of the business name "Western Australia Ship Supplies" (to which I shall refer as "WASS"), which carried on business as ship provedores. The plaintiff alleges that the second defendant was at all material times the partner of the first defendant in WASS. In the alternative, the plaintiff alleges that the second defendant aided, abetted or was directly or indirectly concerned in the commission by the first defendant of the offences alleged against the latter and, by operation of s 236 of the *Customs Act 1901* is deemed to have committed the contraventions in question. In summarising the alleged offences below, I shall use the term "WASS" in lieu of the pleaded term "The First Defendant and/or the Second Defendant".

6 Goods intended for export from Australia and required to be entered with the Australian Customs Service ("Customs") may be so entered by way of the Customs EXIT computer system by a registered EXIT user as or on behalf of the owner of the goods in question. A computer entry of goods intended for export transmitted to Customs via EXIT must contain, *inter alia*, statements concerning the goods to be exported, the warehouse code for excisable goods, the name of the owner of the goods, the consignee, the country of destination, the ports of loading and discharge and the date of export.

7 At all material times, each of Ramson Holdings Pty Ltd trading as IMES Shipsupply ("IMES"), Sealanes [1985] Pty Ltd ("Sealanes") and Nanami Pty Ltd trading as BC Marine/Seven Ocean Ship Supply ("BC Marine") was a registered user of EXIT and when acting as agent for WASS was duly authorised so to act. I shall refer to each of them hereunder as "the supplier", the identity of the supplier being apparent from the context. Each of the suppliers operated a bonded warehouse which contained, *inter alia*, cigarettes, beer and spirits which were excisable goods, subject to the control of Customs.

8 From time to time, WASS purchased and took delivery from the bonded warehouse of IMES or Sealanes or BC Marine of a quantity of Winfield or other cigarettes, being excisable goods. In respect of each of those transactions, the supplier, as agent of WASS prepared and transmitted to Customs an EXIT computer export entry ("the Entry") in relation to the relevant goods. In each case, the Entry stated that the goods were intended to be delivered to a ship; that the goods were ship's stores, not subject to excise duty or to customs duty, to be exported overseas on the ship referred to on the date of export given.

9 In each case, in reliance on the statements contained in the relevant Entry, Customs provided to the supplier concerned an export entry advice ("EEA") with an export clearance number ("ECN") in respect of the goods in question. By the EEA, Customs authorised WASS to deliver the goods therein described to the ship named therein for exportation to a place outside Australia within 30 days of the date of export specified in the Entry. In each case, the ship described in the Entry was engaged in making international voyages with Fremantle as one of its ports of call. In the event that, for any reason, goods referred to in an EEA are not delivered in accordance with the authority contained in that EEA, the person authorised to deliver the goods is obliged to return them to the supplier to be taken back into the bonded warehouse, and to withdraw the Entry relating to such goods.

10 As will appear, there are only two consignments the subject of an EEA issued to WASS which were returned to the relevant bonded warehouse and in respect of which the Entry was withdrawn. Those two consignments were in respect of goods to be delivered respectively to the M/V *CHC # 1* and the M/V *Gopali*. I shall advert to these later.

11 The 35 alleged offences relate to the following transactions:

12 **1**. 40,000 Winfield cigarettes, obtained by WASS from IMES on or before 24 January 1994 for delivery to the Master of the *EL Cordero* as ship's stores.

13 **2**. 40,000 Winfield cigarettes, obtained by WASS from IMES on or before 12 March 1994 for delivery to the Master of the *EL Cordero* as ship's stores.

14 **3**. 60,000 Winfield cigarettes, obtained by WASS from IMES on or before 24 May 1994 for delivery to the Master of the *EL Cordero* as ship's stores.

15 **4**. 20,000 Benson & Hedges cigarettes obtained by WASS from Sealanes on or before 28 May 1994 for delivery to the *Victoria Bay* as ship's stores.

16 **5**. 60,000 Winfield cigarettes, obtained by WASS from IMES on or before 28 May 1994 for delivery to the Master of the *Uniceb* as ship's stores.

17 **6**. 50,000 Winfield cigarettes, and 10,000 Benson & Hedges cigarettes obtained by WASS from IMES on or before 13 July 1994 for delivery to the Master of the *EL Cordero* as ship's stores.

18 **7**. 20,000 Winfield cigarettes, obtained by WASS from IMES on or before 12 August 1994 for delivery to the Master of the *Contship Jork* as ship's stores.

19 **8**. 40,000 Winfield cigarettes, obtained by WASS from IMES on or before 12 August 1994 for delivery to the Master of the *Ace Enterprise* as ship's stores.

20 **9**. 60,000 Winfield cigarettes, obtained by WASS from IMES on or before 25 August 1994 for delivery to the Master of the *Uniceb* as ships store's.

21 **10**. 30,000 Winfield cigarettes, obtained by WASS from IMES on or before 16 September 1994 for delivery to the Master of the *Anangel Pride* as ship's stores.

22 **11**. 40,000 Winfield cigarettes, obtained by WASS from IMES on or before 1 October 1994 for delivery to the Master of the *Ace Enterprise* as ship's stores.

23 **12.** 40,000 Winfield cigarettes and 20,000 Benson & Hedges cigarettes, obtained by WASS from IMES on or before 12 October 1994 for delivery to the Master of the *El Cordero* as ship's stores.

24 **13.** 30,000 Winfield cigarettes, obtained by WASS from IMES on or before 21 October 1994 for delivery to the Master of the *Rubin U* as ship's stores.

25 **14.** 30,000 Winfield cigarettes, obtained by WASS from IMES on or before 8 November 1994 for delivery to the Master of the *Rubin Rose* as ship's stores.

26 **15.** 40,000 Winfield cigarettes, and 21,000 Peter Jackson cigarettes obtained by WASS from BC Marine on or before 24 November 1994 for delivery to the Master of the *El Cordero* as ship's stores.

27 **16.** 59,400 Winfield cigarettes obtained by WASS from BC Marine on or before 15 December 1994 for delivery to the Master of the *Uniceb* as ship's stores.

28 **17.** 40,000 Winfield cigarettes obtained by WASS from BC Marine on or before 23 December 1994 for delivery to the Master of the *Princess Wave* as ship's stores.

29 **18.** 50,000 Winfield cigarettes obtained by WASS from BC Marine on or before 9 January 1995 for delivery to the Master of the *El Cordero* as ship's stores.

30 **19.** 10,000 Winfield cigarettes obtained by WASS from BC Marine on or before 11 January 1995 for delivery to the Master of the *El Cordero* as ship's stores.

31 **20.** 20,000 Winfield cigarettes obtained by WASS from BC Marine on or before 12 January 1995 for delivery to the Master of the *Golden Jade* as ship's stores.

32 **21.** 40,000 Winfield cigarettes, obtained by WASS from IMES on or before 20 January 1995 for delivery to the Master of the *Handy Silver* as ship's stores.

33 **22.** 60,000 Winfield cigarettes obtained by WASS from BC Marine on or before 5 March 1995 for delivery to the Master of the *El Cordero* as ship's stores.

34 **23**. 20,000 Winfield cigarettes obtained by WASS from BC Marine on or before 29 March 1995 for delivery to the Master of the *La Loma* as ship's stores.

35 **24**. 40,000 Winfield cigarettes, obtained by WASS from IMES on or before 31 March 1995 for delivery to the Master of the *Fairwind Express* as ship's stores.

36 **25**. 30,000 Winfield cigarettes obtained by WASS from BC Marine on or before 10 April 1995 for delivery to the Master of the *Charles LD* as ship's stores.

37 **26**. 40,000 Winfield cigarettes obtained by WASS from BC Marine on or before 21 April 1995 for delivery to the Master of the *Rubin Lotus* as ship's stores.

38 **27**. 20,000 Winfield cigarettes obtained by WASS from BC Marine on or before 21 April 1995 for delivery to the Master of the *El Cordero* as ship's stores.

39 **28**. 20,000 Winfield cigarettes and 20,000 Benson & Hedges cigarettes, obtained by WASS from IMES on or before 24 April 1995 for delivery to the Master of the *El Cordero* as ship's stores.

40 **29**. 20,000 Winfield cigarettes obtained by WASS from BC Marine on or before 28 April 1995 for delivery to the Master of the *La Loma* as ship's stores.

41 **30**. 40,000 Winfield cigarettes, obtained by WASS from IMES on or before 1 May 1995 for delivery to the Master of the *Marlin Trader* as ship's stores.

42 **31**. 40,000 Winfield cigarettes obtained by WASS from BC Marine on or before 5 May 1995 for delivery to the Master of the *C S Sunny* as ship's stores.

43 **32**. 20,000 Winfield cigarettes obtained by WASS from BC Marine on or before 29 May 1995 for delivery to the Master of the *La Loma* as ship's stores.

44 **33**. 10,000 Winfield cigarettes obtained by WASS from BC Marine on or before 31 May 1995 for delivery to the Master of the *La Loma* as ship's stores.

45 **34.** 60,000 Winfield cigarettes obtained by WASS from BC Marine on or before 2 June 1995 for delivery to the Master of the *El Cordero* as ship's stores.

46 **35.** 30,000 Winfield cigarettes, obtained by WASS from IMES on or before 21 June 1995 for delivery to the Master of the *Princess Wave* as ship's stores.

47 It is the plaintiff's contention that, in each case, the defendants did not:

(a) deliver the relevant goods to the vessel named in the Entry;

(b) deal with the relevant goods in accordance with the EEA;

(c) export the goods on the relevant ship within 30 days of the date of export specified in the Entry

(d) enter the relevant goods for home consumption;

(e) retain the relevant goods safely;

(f) properly account for the relevant goods or

(g) withdraw the relevant Entry.

48 The plaintiff alleges that the defendants moved the goods to a retail outlet or other premises in Western Australia and contrary to the permission contained in the relevant EEA. Accordingly, the plaintiff contends, the defendants contravened s 61 of the *Excise Act 1901*.

49 Furthermore, by failing to deal with the relevant goods in accordance with the Entry and as soon as practicable after the authority in the relevant EEA was given, the defendants contravened s 114D(1)(a) of the *Customs Act 1901*.

50 The plaintiff then pleads that, in the premises, the authority in the relevant EEA was, by operation of s 116(1) of the *Customs Act 1901*, taken to be revoked and the defendants' failure to withdraw the relevant Entry was a contravention of s 116(2)(a) of the *Customs Act 1901*.

51 The plaintiff pleads that the statements in each Entry were false or misleading in material particulars to the knowledge of the defendants in that:

(a) the relevant goods were stated to be ships stores when the defendants knew they were not;

(b) as the defendants knew, the goods were not in fact to be consigned to the named vessel

(c) The defendants did not intend to export the goods overseas on the named vessel or to export the goods within 30 days of the date of export specified in the relevant Entry, or at all.

52 The plaintiff pleads that the defendants knowingly or recklessly caused, authorised, instructed or directed the relevant supplier to make each of the statements contained in each Entry to officers of Customs, knowing that or reckless as to whether, the statements were false or misleading in the material particulars referred to above. Accordingly, the plaintiff pleads, the defendants have contravened s 234(1)(d)(i) of the *Customs Act 1901*.

53 The plaintiff claims the various penalties prescribed for each contravention of s 61 of the *Excise Act 1901,* and of s 114D(1)(a), s 116(2)(a) and s 234(1)(d)(i) of the *Customs Act 1901*.

54 The defence puts in issue, firstly, the existence of a partnership between the defendants. The defendants say that the first defendant at all material times carried on the business of WASS as the sole proprietor thereof and that, at various times material to the action, the second defendant was employed by the first defendant to carry out work for the business under the instruction of the first defendant.

55 The defendants deny that any of the suppliers was authorised to act as the agent of the second defendant but say that at all material times, the suppliers were authorised to act as the agents of the first defendant.

56 The defendants deny that any of the goods concerned was purchased by or delivered to the second defendant but admit that such goods were purchased by the first defendant and delivered to him.

57 The defendants do not deny that the goods concerned were subject to the control of Customs and they admit that the statements alleged were contained in each relevant Entry.

58 The defendants deny the plaintiffs' allegations that they did not:-

(a) deliver the relevant goods to the vessel named in the Entry;

(b) deal with the relevant goods in accordance with the EEA;

(c) export the goods on the relevant ship within 30 days of the date of export specified in the Entry

(d) retain the relevant goods safely;

(e) properly account for the relevant goods and

(f) withdraw the relevant Entry, where there was an obligation so to do.

59 and advise that they did not enter the relevant goods for home consumption.

60 The defendants admit that they did not and have not withdrawn any Entry, deny that they moved goods to a retail outlet or other premises in Western Australia and deny that they have contravened either the *Excise Act 1901* or the *Customs Act 1901*.

61 Accordingly, the major disputes between the parties are:

(1) was the second defendant a partner in WASS, or, if not, did he aid and abet the first defendant in contravening the *Excise Act 1901* and *Customs Act 1901* as alleged?

(2) were the goods, the subject of each EEA, delivered to the vessels named in the relevant Entry, in accordance with the authority contained in each EEA?

62 In respect of each of the 35 transactions, a statement has been obtained from each of the Masters of the relevant vessels and admitted pursuant to s 79C of the *Evidence Act.* In each case, the Master has denied receiving the goods in question. In the majority of such cases, there is therefore a straight conflict between the first defendant's evidence on the one hand, that he did deliver the goods in question to the relevant vessel and the denial, on the other hand, by the ship's Master that the goods were delivered. The onus to establish her case lies on the plaintiff. There are, however, certain significant matters which tend to discredit the first defendant's allegations that he complied with the terms of each authority and delivered the goods to the vessel named in the relevant Entry.

63 The averments of fact made by the plaintiff constitute *prima facie* evidence of the facts alleged. These averments go into considerable detail, as one might expect in the circumstances. The first defendant's evidence was very general in its terms. He said, in chief:

> "Your Honour, basically it's pretty difficult to remember the evidence that's been given forward for the last 3 days or so, but the point that's most clear in my mind is obviously the last bit of evidence in regards to Hetherington Kingsbury. I'd like to point out, your Honour, that I've been a ships provedore for nearly 20 years from 1976 to 1996. It's basically the only industry I've ever been in. It's the only employment I've ever had, whether it was for a different provedore company, and over that period of time I met a lot of captains, a lot of chief stewards, a lot of crew, a lot of shipping agents. I had contact with people that were in that industry for the same length of time, 20-odd years, so I built up a rapport with these people that, you know, we were on basically first-name basis and they would willingly help me or pass on information to me in the sense of shipping movements coming in, going out, master's name - general information that any provedore can acquire from any particular agent at any given time. In the instance of the Gopali I had actually rung Mr Ian Mace that afternoon to inquire when the vessel was sailing because I was under the impression that I did have an order for that vessel, and I told him so, that I would be putting on board later that evening. As it turned out, the order was cancelled, but Mr Mace did not know that. The reason why he was ringing me was basically to say, 'I thought you had stores to put on. The vessel's sailing. Where are you?' I informed him then that, no, the order had been cancelled and that's why I wasn't there. Your Honour, the provedoring game is a funny industry because I'd been in it 20 years, and 5 years of it on my own, and it doesn't work on written contracts or anything like that. It's on who you know, how friendly you are with them, how much they trust you, how you look after them. It's based on a lot things that sort of - personal things, more or less, and basically the whole thing is based on trust. I recall Mr Greenwood's first statement saying that he felt that Western Australian Ships Supply was only in the provedoring industry because basically once the investigation commenced, within 6 months the business closed down. He was very correct in saying that because basically I had no written contracts with any

of the vessels I was supplying, with customs - well, not so much harassment, but during their course of investigation of calling on all my vessels, talking with people, basically all my clients - I basically lost all my clients. None of the provedoring companies that I was - purchasing bond stores or purchasing any other stores, would have any dealings with me whatsoever, and basically drove Western Australian Ships Supply to close its doors because no-one would have anything to do with us because of the investigation, even to the extent, your Honour, that once Western Australian Ships Supply closed there was a job advertised for Sealanes Supplies which I applied for, and basically it was a role that I could've walked in one day and commenced work the next because it was something that I'd been doing all the time. The managing director interviewed me that day and said, 'Look, the job is yours, but unfortunately I can't give it to you because of the investigation that surrounds you' - and that the bad name, or whatever you like to call it, that I may basically bring with me, even though I'd not been proven guilty in any sense whatsoever. Your Honour, I did establish a market for Winfield cigarettes and it was a unique market because none of the other provedores had ever done it and I was the only one that was doing it, and I'll admit that quite freely because no-one had ever taken the time to actually analyse the situation between international cigarettes and Australian cigarettes. It probably cost me a lot of money to establish that market because, your Honour, I commenced business on my own in 1990 and basically I called on everyone's ships - Sealanes ships, Imes (*sic*) ships, my ships.

In the early days people I was talking to then would have only been first officers, second officers, assistant cooks, but in the years to follow those people did return on different vessels with different titles. The first cook was no longer first cook, he was the chief cook, or the assistant steward was no longer assistant steward, he was a chief steward, or the first officer became the chief officer and so forth. Because I have been there for such a long time, these people were quite prepared to deal with me and help me out. There's even one of the statements that one of the captains says that he basically dealt with Western Australian Ships Supplies - which is one of the livestock carriers - because he knew me and he thought, because I was only a small company, that he wanted to help me out and that's why he dealt

with me. Basically, your Honour, that's how the industry was basically made up - on trust. People liked you so they helped you. If they didn't like you, they wouldn't have a bar of you and that's basically - your Honour, I really can't say much more.

I think you might like to turn your mind to these cheques that were apparently banked to - - -?---Yes. Actually, now that you have brought that up, your Honour, I would like to bring that up.

Yes?---Mr Russell, who's a very good friend of my brother's and during the course of the years has become a friend of mine - he was basically purchasing soft drinks from us and selling them and distributing to delicatessens that he was supplying bread to. When he was purchasing from us and reselling them, basically when the shopkeepers were paying him for the goods they would give him cash cheques, so in return when he came back to pay us would pay us with cash cheques or whatever other cash there was and then he would keep the difference and that is the reason why those cheques ended up into our account from those delicatessens, but in actual fact they're from Mr Russell because that's what he was using to give us for payment of the goods that he was purchasing from us and that's how they basically came into our system.

Do you want to deal with the suggestion that Winfield cigarettes were purchased from you or that you got paid for them by shops in town?---Your Honour, we never sold any cigarettes to any shops.

You didn't? All right. Is there anything else you wanted to tell me about the case?---As I said earlier, your Honour, I can only go on what's fresh in my mind, but, no, at the moment I can't think of anything else."

64 He was cross-examined and the following took place:

"PRICE, MS: Mr Allegretta, you have sat here for the last 2 and a half days and heard all the evidence that the plaintiff, Australian Custom Service, has put forward. We have made a number of allegations on the basis of that evidence. One of those related to the partnership - we have alleged a partnership, and what I'm saying to you is that there was a partnership between yourself and your brother. That you were in

partnership as Western Australian Ships Supply. Do you agree with that?---No, not at all. I started the business in 1990 as a sole trader. I basically worked on my own for about the first 18 months to 2 years. My brother in that time period was helping me on occasions when I was storing ships and I needed a hand because I was basically doing it on my own. As the business grew and I was able to afford to give my brother some sort of salary or wage he then came and worked for me. But he was never a partner in Western Australian Ships Supply. I solely started that off my own back. He had never been in the industry before and that was the only industry I've ever been in.

So you don't agree with the plaintiff's assertion that there was a partnership between you and Mr Frank Allegretta?--- It's not a matter of agreeing. It's a fact that my brother was not my partner. He might be my partner because he's my brother, but he wasn't a partner as in the business sense of Western Australian Ships Supply.

The plaintiff has put forward considerable evidence to the court that you arranged for certain provedore companies - Imes (*sic*) Shipsupply, BC Marine, and Sealanes - to make entries with customs for you?---That's correct.

Those entries falsely stated, in our submission, that the goods were ships stores to be exported overseas on ships?---That's correct.

So you are admitting that they were falsely stated to be ships store for exportation?---No, no, sorry. The ECNs are correct. They were instructed by me that those goods were going on board the ship and that they raise those documents in accordance with what they had to do so that I could move the goods. I totally agree with that; I've never denied the fact.

Because it is our submission that on the evidence you caused various statements to be made and those statements were false and they were misleading. Do you agree with me on that?---I don't know what you mean.

You made statements that you would deliver goods to vessels?---Yes.

That the goods were to be ships stores?---Yes.

And that the goods were to go overseas and in fact isn't it correct that you had no intention of sending the goods overseas?---No, the statements were made as correct, that they were ships stores. The goods did go on board and that they were going overseas. There was nothing false about that; that is correct.

But the goods didn't go on board, did they, Mr Allegretta? They actually went into your premises and then went from there to all sorts of outlets around the state, of which prime examples were Mr Macfarlane's supermarket and Mr Valentine's mini-mart?---Mr Macfarlane, I've never met the man and I've never had any dealings with him. So if he has acquired cigarettes from somewhere, he certainly hasn't acquired them from me. The statements we made as in the goods were being shipped is all true and correct.

It's also the plaintiff's position, Mr Allegretta, that because you didn't make a proper entry with customs and you didn't deliver the goods in accordance with the entry, you then added to that by failing to withdraw an entry - - -

What we are saying is that you failed to withdraw that entry, as you should have done?---I would have failed in the sense if I hadn't have shipped the goods, but because the goods were shipped I didn't fail in anything. If I had have withdrawn the actual documents when the goods went on board, that would be incorrect. Why would have I failed in withdrawing them when the actual events happened and the cigarettes went?

PRICE, MS: Yes, that's right, and what I'm saying to him - that he didn't deliver them in accordance with the ECNs, that they were delivered to local premises?---But I did deliver them in accordance with the ECN, which was ships stores to be exported.

Mr Allegretta, did your brother Mr Frank Allegretta assist you in delivering goods to various premises in the metropolitan area of Perth?---We didn't deliver goods to various premises all over Perth. We delivered goods to ships, and my brother did assist me in delivering provisions and bonded stores to vessels, yes.

Did your brother assist you in collecting bonded goods from Imes (*sic*) warehouse?---Yes, he did.

Did he assist you in collecting goods from BC Marine's warehouse?---Yes, he did.

Did he assist you in collecting bonded goods from Sealanes' warehouse?---Yes, he did.

Finally, Mr Allegretta, you mentioned in your evidence that you cancelled the order for the Gopali?---That's correct.

Who did you receive the order from?---I can't recall exactly, but I'm pretty sure it would have been from one of the officers or one of the stewards, but I can't recall exactly who it was.

You can't recall?---Not exactly.

Isn't it the case because it never happened, that you never did actually receive an order for goods from the Gopali?---In a period of 20 years as a provedore and a period of 5 years on my own, I'd boarded a lot of vessels, I met a lot of ships people, and I couldn't possibly recall every single individual person that I met.

When you received an order from a ship - and in this case you say you received an order from the Gopali - did you record the order?---Did I recall the order in what sense?

Record the order, write it down?---I would have taken a mental note of it or, yes, I would have scribbled it down on a piece of paper, or something, somewhere. Basically all the orders that I'd received, depending on the size of it - if it was only one item obviously I'd remember it, but if it was more than that, I would write them down somewhere on the back of a notebook that I carried in my briefcase.

Do you recall who cancelled the order?---Again it would have been the person that ordered it would have cancelled it.

How often did you deal with the Gopali?---Again by memory I think we might have supplied the Gopali maybe two or three times, but I can't be sure of that.

Could the witness be shown volume 4, please.

Mr Allegretta, can you have a look at 928. This is an invoice apparently for the master and owners of the Gopali for 31 December 94?---That's correct.

Who drew up the invoice?---Who drew up the invoice - I drew up all the invoices.

Right. Did you draw this up on 31 December 94?---I drew up all invoices of Western Australian Ships Supplies. I drew them up myself.

Did you draw this one up on the date it's on, 31 December 1994?---If I dated it the 31st, I would probably say yes. I could only go by that date, yes.

Do you recall when you got the order from the Gopali, what time and what day?---No, I couldn't recall.

But you would have written a handwritten note for it? ---Well, for something like that I would have probably memorised it.

You memorised. Do you recall at about what time you got the order to cancel the invoice?---It was late. I think it was 8, 9 o'clock at night, but I can't be sure. It was late.

Did the person who cancelled the order tell you why the order was being cancelled?---Again I'm only going by memory, but I think he had basically done a deal with somebody else. I can't recall exactly. 1994 was 5 years ago. I honestly can't.

It's a bit strange, isn't it, Mr Allegretta, that this order is cancelled when you know that the customs are taking a particular interest in this one. We have seen evidence all the way through this case of various orders being taken out of Imes' (*sic*) warehouse and our (*sic*) of BC Marine's warehouse and out of Sealanes' warehouse. None of them were ever cancelled by any ship's master or officer, but then suddenly customs take an interest in the Gopali and you cancelled the order at about 2 to 3 hours before its departure?---I can't make any comment on that.

Mr Allegretta, I think you said earlier that the withdrawal was obtained from the ship at about 9 o'clock?---Well, I have estimated. As I say, it was 31/12/94. I couldn't particularly remember what time it was, whether it was day, afternoon or

whatever. I don't know, honestly. It would depend on what time the ship was sailing. Obviously I would have received a phone call before that.

Do you remember was it 9 am? You said 9.00. 9 am or 9 pm? Which time was it?---I used to get a lot of phone calls a night time and I used to get a lot of phone calls early in the morning. I used to get a lot of phone calls during the day. In this particular instance I honestly couldn't tell you. It would have been - prior to the ship sailing I would have had a phone call to cancel it. I wouldn't have possibly been able to cancel after the ship had sailed. Therefore it would have had to have been beforehand. I don't know what time the ship sailed. I couldn't tell you right now.

Did Mr Ian Mace from Hetherington Shipping Agents phone you as the Gopali was leaving?---I can't remember. I don't know.

I thought you said earlier that he had made a call to you to check whether your order was on board?---I thought we were talking about the CHC No 1.

No. My recollection of your evidence was that you said, about the Gopali, that Ian Mace phoned because he didn't know whether the order had been cancelled?---Well, Ian Mace rang up at midnight or so to find out where I was and if it was going on board, but the order would have been cancelled prior to that.

This ship left, as I understand it, Mr Allegretta, at 12.30 pm on 31 December 1994 and that Mr Mace was in attendance at the vessel?---Yes.

Your evidence was earlier that he had phoned you from the vessel to find out if the order had been cancelled?---If the goods had gone or if I was delivering goods on board, that's true.

Isn't it the case that he actually phoned you to tell you that customs had been on board and that you had better get your order sorted out with customs because they no doubt will have checked bond and realised that there was no bond from Western Australian Ships Supply on board and that you would need to withdraw that entry quick smart?---No, he didn't, not on that fact, no.

Do you recall the discussion with Mr Mace?---It was very brief because it was very late and I was already in bed.

I think that doesn't really ring true, does it, Mr Allegretta, because would you have been in bed at 12.30 pm in the day?---12.30 pm night-time?

No, 12.30 pm is the middle of the day, isn't it?---Lunchtime. That's why I thought you were saying before that we were talking about the CHC No 1. 12.30 afternoon

You just said you didn't remember the conversation with Mr Mace because you were in bed?---Because I thought it was of a night-time that you were referring to, 12.30.

You are making it up, aren't you, Mr Allegretta, because I said to you that the Gopali had departed from the berth at 12.30 pm on 31 December 1994 and I asked you what - I confronted you with what Mr Mace had actually phoned you about, which was to alert you that customs had been on board, and you said to me, 'I don't remember what Mr Mace said because it was late and I was in bed.' That was just not the truth, was it, Mr Allegretta?---I can't remember exactly back to 94 what events happened that afternoon, that evening or that morning. I'm only going by memory.

I'm saying to you that the fact was that none of your orders for bonded goods for Winfield cigarettes were withdrawn by the vessels' masters or chief officers or whoever ordered them from you or allegedly ordered them from you, except for the two ships the CHC No 1 and the Gopali that you were informed that customs were interested in and were actually checking bond on store. That's the truth, isn't it, Mr Allegretta?---No, it's not. The orders were cancelled for whatever reason and everything else was put on board, whatever time it was.

All these orders for Winfield Blue cigarettes, they never went on board the ships, did they, because the ships didn't want them, did they?---Whoever ordered Winfield Blue and Winfield Red, they went on board, yes.

The evidence has been that ships' captains on international ships like cigarettes that they can barter in other parts of the

world?---From my understanding, Winfield have been a good bartering tool overseas as well.

There's no evidence of that, Mr Allegretta, and what I say to you is that these Winfield Blues were very marketable in the local supermarket market and elsewhere within Western Australia and this was a wonderful opportunity, as long as it lasted, to sell Winfield Blue cigarettes, a popular local brand locally and to add to your cash flow?---Our cigarettes never hit the local market.

The plaintiff's argument is that they did and the evidence shows that they did, Mr Allegretta. There's no evidence to show that they went on the ships at all. The masters' statements clearly indicate that they did not go on the ships. That's correct, isn't it? You have seen the masters' statements and they clearly indicate that those orders were never received on the ship?---A lot of masters don't tell the truth, for whatever reason at whatever particular time. They are basically concerned about looking after themselves or whatever they've got going at the particular time. A lot of good English speaking masters when it suits themselves really can't speak very good English when it suits them.

That's a mighty lot of masters all being inclined not to tell the truth, isn't it, Mr Allegretta? There were something like 60 to 70 masters involved here. They are all not telling the truth. Is that what you are saying?---I don't know. As far as I'm concerned they're not telling the truth; no, for whatever reason they haven't on those occasions."

65 In relation to the *Gopali*, the evidence was that it departed from the wharf at 12:25 or 12:30pm on 31 December 1994 and the record of telephone calls made that day on the mobile telephone which had been supplied to the ship by the shipping agent shows a call to the telephone number of WASS at 12:20pm that day. Officer Greenwood said that all visitors are required to leave a departing vessel about 15 or 20 minutes before the vessel leaves the wharf and he deduced therefore that the telephone call was probably made from the wharfside after the ship's gangway had been returned on board and probably by the shipping agent, one Ian Mace. The *Gopali* had been boarded by Customs officers that day and Mr Greenwood speculated that the purpose of the telephone call was to alert the first defendant to that fact, so that he could return the goods to

the bonded warehouse and withdraw the Entry in the knowledge that the Customs would have ascertained that the goods said to have been destined for the *Gopali* had not been delivered to it. I have set out above what the first defendant said was the purpose of the telephone call. The timing of the call makes the first defendant's version improbable, in my opinion.

66 Mr Guilford gave evidence in relation to the supply in Port Hedland to the vessel *Charles L-D* of certain goods the subject of WASS invoices 0936 (which listed bonded goods including 10 cartons of Marlboro cigarettes and two of Salem cigarettes) in the sum of $1,689 less a discount of 5 per cent; and 0937, listing unbonded provisions. Mr Guilford had received a note from the first defendant in relation to the goods to be delivered to the *Charles L-D*, in which he says, *inter alia*:

67 "IF CAPTAIN WANTS TO PAY CASH FOR BOND GIVE HIM 10% DISCOUNT FROM $1,689 = $AUST 1520.10 EXCHANGE RATE US $0.75 -AUST $1.00 US $1,140.00"

68 Invoices 0936 and 0937 were signed by the Chief Officer of the *Charles L-D* and bear the ship's stamp at the foot thereof. Mr Guilford remembered delivering the goods the subject of those two invoices to the vessel in Port Hedland.

69 There was also produced a WASS invoice 0938 (listing 30 cartons of Winfield cigarettes and 40 cases each of Coca Cola and assorted soft drinks) in the sum of $2,965. That invoice is dated the same date as the two referred to immediately above, namely 17 April 1995. Unlike the others, however, it is not signed by the Chief Officer of the vessel, it has no ship's stamp and makes no provision for any discount. It is endorsed "PAID CASH" and appears to have been initialled by the first defendant. Mr Guilford did not recollect delivering the goods reflected in that invoice and the Master of the vessel has denied receiving the goods. There is no suggestion that the first defendant was in Port Hedland at the relevant time and the first defendant did not deal with the issue nor, strangely enough, was he cross-examined as to this invoice. In my opinion, the probabilities are that this was a false invoice. The cigarettes the subject of that invoice were included in the ECN 5F951001224XLC dated 11 April 1995, as were the other cigarettes reflected in Invoice 0936 and were delivered to WASS from the BC Marine bonded warehouse. I am satisfied that they were not dealt with in accordance with the relevant ECN.

70 The evidence of the first defendant is directly opposed to that of the several Masters of the ships named in the various ECNs. At the outset of the trial, I ruled that the statements of those Masters were admissible pursuant to the provisions of s 79C of the *Evidence Act* and that they need not be called as witnesses as they came within the ambit of s 79C(2)(c) and (g) of that Act. By s 79D of the *Evidence Act,* in estimating the weight, if any, to be attached to a statement rendered admissible by s 79C, regard is to be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular, to the matters set out in paragraphs (a) to (f) of s 79D. Of those particular matters, only paragraphs (a) and (b) are relevant to the present case. Those paragraphs are as follows:

> "(a) to the question of whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated;
>
> (b) to the question of whether or not the qualified person or any person concerned with making or keeping the document containing the statement, had any incentive to conceal or misrepresent the facts ... "

71 The statements were not made contemporaneously with the events, but they were made after consideration of the contemporaneous records of the ships.

72 There is no discernible reason for the Masters to have concealed or misrepresented the facts and none has been suggested by the defendants. It is, I think, significant that so many of the Masters have given the same evidence in circumstances in which there appears no reasonable possibility of their having got together to agree on an untrue story. Although the first defendant has said that these Masters have been untruthful, there is really nothing to substantiate such an allegation and the probabilities are, I consider, overwhelmingly against it.

73 Evidence was given by Mr Macfarlane who was formerly a partner in a firm known as Chapman Road Supermarket to the following effect (I have edited the transcript by deleting irrelevant parts of the evidence):

> "So this was in 1994-1995 you were trading under that business name?---That's right.
>
> Were you an active partner, actively involved in running the supermarket?---Yes.

Did your role involve ordering stores for the supermarket?---Yes.

Were you ever approached to purchase cigarettes other than through a tobacco distributor?---Yes.

Would you mean (*sic*) explaining who approached you and when the approach was made?---I don't know the exact dates but it was Stuart, or Stewie as I know him. He was a De Campo driver.

Do you know his full name?---Stuart Russell.

Was Mr Russell making bread deliveries to the supermarket?---That's right.

What did Mr Russell offer to you?---Just Winfield Red and Winfield Blue.

Cigarettes?---Cigarettes.

Packets, small packets, cartons?---Cartons.

Were they big shipper's cartons or small?---Shipper's, yep.

Can you recollect how many would be in such a box?---I think it was about 40.

40 what?---Cartons.

Smaller cartons?---Yes.

Did you agree to accept supplies of cigarettes from Mr Russell?---Yes.

Do you recall what price he offered them to the supermarket?---Yes, $4.

Was that a good price by comparison with the normal wholesale price?---Yep, about 50 cents cheaper.

Was Mr Russell delivering these cigarettes to you when he made his bread deliveries?---No, after.

Did he use a De Campo's van for that?---No.

Can you say what sort of vehicle he normally delivered in? ---It was just like a white Hiace van.

When he made deliveries, did he have someone else with him?---Not all the time, no.

How often would you say he had someone with him?---Maybe about half the time.

Do you know the person that was with him?---I didn't at the time, no.

Can you describe what that person looked like that was with him?---Yes.

Would you be able to say whether that person was in the courtroom today?---Yes.

Would you mind pointing him out, please. You were pointing to the two Mr Allegrettas. Which one are you saying?---The one to the left.

Dark-haired Mr Frank Allegretta. Yes, thank you. How did you normally pay for these cigarettes when they were delivered?---With a cheque.

By a cheque, and it was a partnership cheque. Was there a special account it came out of?---No, just the shop account.

How did you make the cheques out?---Just to cash.

They were just made out to cash and, what, you handed them to Mr Russell?---That's right.

Did you ever hand them to Mr Frank Allegretta?---No.

Are they the chequebooks that you wrote the cash cheques out from?---Yes.

Would you mind just describing into the record what's written on the cheque stubs? The first one is - perhaps you had better tell me which one you have got there, which stub?---The first one is 1/7/94. It has got STS, cigs, and the amount.

What is the amount?---4800.

You have written on there 'cigs' and what was the other thing that was written?---STS.

Why was STS written on there?---It's another - just sort of my record so I knew what it was for. I think it was another smoke company that I didn't deal with, but it was just so I knew what the difference was.

Yes, so you had written a cash cheque out to Mr Russell, or written a cash cheque out, given it to Mr Russell and on your cheque stub you wrote the amount of the cash cheque?---Yes.

And you wrote the word 'cigs' to indicate to yourself that they were for cigarettes, that you had purchased cigarettes?---That's right.

Then the STS, if I'm understanding your evidence correctly, is some sort of signal to yourself. Can you just explain what the signal was - - -?---I think it was another smoke distributor. I don't know the exact name offhand. I don't remember.

If I can understand you correctly, you weren't prepared to write on your cheque stubs that you had paid cash and given a cheque to Stuart Russell for cigarettes?---That's right.

So to remind yourself what the cheque was for, you wrote STS?---That's correct, yes.

Which was an acronym for another cigarette supplier?---That's right.

Did you use that form of shorthand on all the cheque stubs for all the cash cheques you made out and gave to Stuart Russell?---I would say yes.

Would you mind just having a look at cheque stub 913. I think it's for 14 November 1994?---The 14th of the 11th, was it?

Yes, 14/11/94?---Yes.

That description there is not cigs. Can you say what it was?---It's sort of like D apostrophe S

All right. Can you say from your recollection that that stub was for the purchase of cigarettes?---Yes.

And that you changed the 'c i g' to 'DGS'?---That's right.

That's your handwriting that it has been changed. Would you mind just having a look at cheque stub 968 for 19 December 1994?---Yes.

That one has got the word 'cigs' on it or the word 'DGS'?---It's about the same.

It has got 'DGS' has it? Would you mind just confirming that that was a cheque stub you wrote for a cash cheque for cigarettes?---Yes.

Would you please have a look at cheque stub 900 for 12 January 1995? Again has that one got 'cigs' on it or "DGS"?---"DGS".

Would you please confirm whether or not that was a cheque stub for a cash cheque for cigarettes?---Yes, it was.

Lastly would you please have a look at cheque stub 929 for 10 February 1995?---Yes.

Has that got the word 'cigs' on it or the letters 'DGS'?---DGS.

Would you kind (*sic*) please confirming whether or not that was a stub for a cash cheque for cigarettes?---It was.

Mr Macfarlane, do you recall when the supply of cigarettes from Mr Russell ceased?---Not the exact dates, no.

According to what I have been told, the last cheque stub was 929 and that was written on 10 February 1995?---The exact date would have been somewhere around there.

Somewhere after February 95?---Yes.

Do you recall when you were told that there would be no more cigarettes? Do you recall the occasion?---Earlier.

Who told you that there would be no more cigarettes?---Stuart."

74 Cross-examined by the first defendant, the witness said:

"Mr Macfarlane, were you dealing directly with Mr Russell or Western Australian Ships Supplies?---Just with Stewart, yes.

> Just with Stewart. Were you purchasing soft drinks from Mr Russell?---I had a few soft drinks, yes.
>
> Would it be possible that you met Mr Allegretta on an occasion when Mr Russell was delivering soft drinks to your shop?---It's quite possible. I'm not too sure, I can't quite remember.
>
> Mr Macfarlane, do you know for certain where Mr Russell was acquiring whatever goods he was selling to you from?---No."

75 An examination of the cheque stubs of Chapman Road Supermarket and the duplicate bank deposit slips of WASS demonstrates that the following cheques drawn by Chapman Road Supermarket were deposited to the credit of the bank account of WASS on the date indicated.

Cheque		Deposit	
Date	Amount	Date	Amount
-.12.93	$1,976		
25.1.94	$2,560		
14.3.94	$1,200	15.3.94	$1,200
30.3.94	$1,200	31.3.94	$1,200
31.5.94	$4,640	31.5.94	$4,640
1.7.94	$4,800	1.7.94	$4,800
31.8.94	$4,800	1.9.94	$4,800
28.9.94	$2,000	28.9.94	$2,000
14.11.94	$3,200	15.11.94	$3,200
19.12.94	$3,450	20.12.94	$3,450
12.1.95	$2,000		

76 I have mentioned the evidence of the first defendant to the effect that the cash cheques were given to WASS by Mr Russell in payment for soft drinks sold to him, but I am not persuaded that that explanation is true in the light of the evidence of Mr Macfarlane generally. When cross-examined by the first defendant, Mr Macfarlane gave the following evidence:

> "Mr Macfarlane, were you dealing directly with Mr Russell or Western Australian Ships Supplies?---Just with Stewart, yes.

> Just with Stewart. Were you purchasing soft drinks from Mr Russell?---I had a few soft drinks, yes.
>
> Would it be possible that you met Mr Allegretta on an occasion when Mr Russell was delivering soft drinks to your shop?---It's quite possible. I'm not too sure, I can't quite remember.
>
> Mr Macfarlane, do you know for certain where Mr Russell was acquiring whatever goods he was selling to you from?---No."

77 The probabilities seem against the proposition that Mr Russell purchased soft drinks from WASS to a value in excess of $21,000 in a period of some 10 months and there is no evidence supporting any such proposition. One would have expected the production by the defendants of evidence of an account reflecting the dealings between Mr Russell and WASS, debiting the cost of soft drinks supplied and crediting the amounts of the cheques and any other payments (of which there was no evidence) made by or to Mr Russell as the case might be. I do not accept the first defendant's evidence that the cheques were given to WASS by Russell in payment of the latter's indebtedness to WASS for soft drinks supplied to him.

78 Mr Valentine, who had at the relevant time operated his own "deli mini-mart" at Rostrata Avenue in Willetton, the Rostrata Mini Mart, gave the following evidence in relation to his purchase of cigarettes:

> "Do you recall ever being approached by anyone to take delivery of cigarettes?---Yes. A guy that used to deliver bread for us from De Campo's Bakery, a chap by the name of Stewie. I don't know his second name. He approached us one day and asked us if we wanted to buy any cheap cigarettes.
>
> Do you recall what sort of brand of cigarettes he was offering?---Winfield Blue, to the best of my recollection.
>
> Do you recall what you said to him when you were offered the cigarettes?---The first immediate reaction, I asked him if they were hot. That was a natural thing that came to mind. He basically replied, 'No, don't be stupid, they're not.'
>
> All right. Did you decide to take an order of cigarettes from him?---We purchased one carton of cigarettes from Stewie, yes.

Do you recall what the carton was like? Big, small?---It was just a complete carton. Each packet of cigarettes was a single packet of cigarettes in the box - ie, the outer wrappers were taken off the carton.

How big was the box? Was it a big shipper's carton or - - - ?---About so square. It could take 300 packets.

All right. Were these being offered to you at a good price?---$4 a packet at the time.

How did that compare with the normal wholesale price you had to pay?---I believe we were paying at FAL around about $5.20 a packet at the time, something like that.

Okay. So you say you bought one carton. Do you recall actually paying Stewie for the cigarettes?---I didn't pay but my wife did.

Do you recall now what bank you ran the supermarket through, what bank account?---For the deli, the National Bank, Booragoon.

You wouldn't by any chance remember the total amount she paid for the carton?---$1600. $4 a packet.

1600. Do you have any knowledge at all as to what the cheque was made out to?---I made it out to cash because Stewie asked for cash dollars. It was a Tuesday that we actually paid him and of course we did the banking on the Monday from the weekend's takings, so we didn't have $1600 in cash available, so I wrote a cash cheque for 1600.

You said to me earlier that your wife paid him?---Yes.

She physically handed the cheque over to Stewie?---I believe that was the case, yes.

But the arranging of the cheque was done by yourself. Is that correct?---I can't recall whether I wrote the cheque or whether the wife wrote the cheque, to be honest with you.

How do you know then it was a cash cheque?---Because I told my wife to give him a cash cheque, I believe, at the time, yes.

> Did you take delivery of any more packets of cigarettes? ---No, we only took the one box.
>
> You only took the one box?---Yes.
>
> Were you ever offered any more?---On occasions, yes, we were; but, to tell you the truth, $1600, being a small businessman, is a big outlay for me and we couldn't afford to keep doing it that way and have $1600 worth of cigarettes sitting down. So we only took the one box."

79 He was cross-examined as follows:

> "Mr Valentine, do you know Western Australian Ships Supply or anyone thereof?---No.
>
> Have you ever had any dealings with Western Australian Ships Supply?---None whatsoever."

80 A cheque for $1,600 drawn by Rostrata Mini Mart was deposited to the credit of the bank account of WASS on 1 July 1994, on the same date as the deposit of $4,800 received from Chapman Road Supermarket.

81 There was evidence that WASS had placed an order with Port Stationery for the manufacture of a rubber stamp in the name of the M/V *Pontonikis*, Limassol and in the form of a ship's stamp. The stamp had been ordered to reproduce an impression similar to that which had been placed on a document by the genuine stamp of the M/V *Pontonikis*. No explanation was given by the first defendant for having obtained such a rubber stamp, to which, at least *prima facie*, he was not entitled. The probabilities are that the stamp was obtained in order to forge a document, purporting to have been stamped by an officer of the *Pontonikis*. This evidence clearly called for an explanation by the first defendant but none was given.

82 The evidence satisfies me that the plaintiff is entitled to the relief claimed in the statement of claim as against the first defendant.

83 In relation to the second defendant, I am not persuaded that the evidence establishes that he was a partner in WASS. The only evidence to that effect is the statements by the Customs Officers Greenwood and Scarfe as to his answer to an informal question asked by Officer Greenwood, not either tape-recorded or written down at the time but formulated by their mutual agreement as to what had been said, effected

some weeks later. They gave evidence in identical terms as to what the second defendant had said during the visit when the search warrant was executed. Part of what was said during that visit was tape-recorded and there was no reason why the alleged admission could not have been recorded at the time. The direct evidence of the first defendant was to the effect that the second defendant was not a partner in the firm at any time, although he was employed to assist the first defendant in the business and did, at times, collect cigarettes from the bonded warehouse of a supplier.

84 My attention was drawn to the provisions of s 23V of the *Crimes Act* (Cth) and to the decision in ***R v Raso*** (1993) 68 A Crim R 495, in relation to the question whether what the second defendant was alleged to have said was inadmissible. In the absence of any appropriate argument on behalf of the defendants, I prefer to express no view on that question. I am, however, prepared to discount the evidence of the alleged admission by the second defendant for the reasons that:

(a) I am concerned at the fact that the two customs officers got together to agree upon the words alleged to have been said by the second defendant some weeks before, and their identical statements on oath as to what words were said by him; and

(b) there is, in any event, no reason to suppose that the second defendant has any real appreciation of the legal elements of a partnership or of the legal meaning of the word "partner".

85 Coupled with the direct evidence under oath of the first defendant that the second defendant was not his partner and the fact that only the first defendant is shown as proprietor of the business name, together with the absence of any supporting documentary evidence which might tend to establish the existence of a partnership between the defendants, I find that I am not satisfied that such a partnership did in fact exist.

86 The plaintiff alleges in the alternative that the second defendant aided and abetted the first defendant in the commission of the offences charged. There was some evidence that, on occasions, the second defendant had collected goods from the bonded warehouse of a supplier, and that there were occasions when he had accompanied Russell on visits to Mr Macfarlane's business (not necessarily when cigarettes were supplied to Mr Macfarlane). However, there was no evidence which connected the second defendant to any specific offence.

87 I raised this problem with counsel for the plaintiff. The following was said:

> "PRICE, MS: It is our submission, your Honour, obviously enough that the acts which the second defendant undertook in this whole matter points quite clearly to the fact that he was assisting the first defendant in the commission of any offences. He played a substantial part. Alternatively, we would say that even if it was found on the evidence that it can't be inferred that he played any part, there is evidence that he did not know what was going on and that he made no effort to stop or prevent the occurrence of the offence. In regard to his active assistance in the commission of the offence, we point to the fact that he has been sighted by a number of witnesses collecting goods from the licensed warehouse premises.
>
> WHITE J: Did they identify any particular collection of goods with any particular claim in the statement of claim?
>
> PRICE, MS: No, they couldn't. My recollection was I did ask them about that, but their sightings of the second defendant were general - certainly with Mr Dennett it was a general recollection of sighting the second defendant. Mr Dennett, as I understand his evidence, knew the first and second defendants, particularly the first defendant, socially; that he really didn't have a great role in good (*sic*) being removed out of the warehouse at Imes (*sic*), but he would be down in the warehouse on occasions when the first and second defendants came in to collect goods.
>
> WHITE J: I think what I am saying is this: if the evidence shows that on some unidentified number of occasions the second defendant assisted the first defendant, if the first defendant was committing an offence, does that mean that the second defendant is liable for all the offences committed by the first defendant? If so, why?
>
> PRICE, MS: I would say yes if the evidence was sufficient to establish a pattern of behaviour in which he was consistently and regularly assisting.
>
> ...

WHITE J: In this case let's assume that the evidence established the commission by the first defendant of some of these offences that you have charged him with. How does one tie in the second defendant to a specific offence with this evidence?

PRICE, MS: It's going to be extremely difficult, your Honour, because all the evidence is related to his presence at various unspecified occasions.

WHITE J: On some occasions, but not very well identified occasions.

PRICE, MS: No. That's right. They're all unspecified in time.

WHITE J: Is that enough to give rise to a criminal conviction, even on the balance of probabilities; that because he was seen there on certain occasions, unidentified, therefore he is guilty of a specific offence committed on a particular day? How does one make that transition?

PRICE, MS: Yes. I will have to perhaps do some work on that one, your Honour, if I can, because I agree with you. It seems extremely difficult. If he can't be targeted to an offence in the same way that the first defendant could be targeted to an offence, it's very hard to draw the inference that he was assisting in that offence.

WHITE J: There would be no evidence that he was assisting in any particular offence.

PRICE, MS: That's right. That's the thing that the plaintiff is faced with at the moment; that there is no evidence of specific assistance in relation to any one of the 35 occasions.

WHITE J: That may well be a difficulty in the way of the plaintiff succeeding against the second defendant.

PRICE, MS: Yes, your Honour. That's something I will have to ... "

88 Nothing further was offered in support of the plaintiff's case as against the second defendant. In my opinion, the evidence is insufficient to establish on a balance of probabilities that the second defendant committed any of the offences alleged and the plaintiff's case against him

must therefore rest upon the averments made in the statement of claim. It is therefore necessary to consider these in the context of the statement of claim.

89 Section 255 of the *Customs Act 1901* and s 144 of the *Excise Act 1901* are in similar terms and provide that, in any Customs or Excise prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter or matters averred. That provision does not, by sub-section (4) of the relevant section, apply to an averment of the intent of the defendant.

90 In this case, the plaintiff has so framed her pleadings that the relevant averments affecting the second defendant are stated in the alternative. For example, in relation to the alleged partnership between the defendants, the plaintiff pleads in par 4:

> "4. At all times material to this action the First Defendant and the Second Defendant as partners, alternatively the First Defendant as sole proprietor, carried on a business as ship providores under the business name 'Western Australia Ship Supplies' ('WASS')."

91 That pleading, by virtue of the sections of the *Customs Act 1901* and the *Excise Act 1901* to which I have referred establish, *prima facie,* that the defendants as partners, alternatively, the first defendant as sole proprietor, carried on the business pleaded. The averment cannot, in my opinion, be severed so as to afford *prima facie* evidence of the alleged partnership but must be taken in its full context.

92 Again, in par 8 of the statement of claim, for example, the plaintiff pleads:

> "On or before 24 January 1994 the First Defendant and/or the Second Defendant purchased from IMES and took delivery of 30,000 Winfield Blue cigarettes and 10,000 Winfield red cigarettes, being excisable goods for the purpose of the *Excise Act 1901* ('the First Goods')."

93 As framed, therefore, the averment is not that the second defendant purchased or took delivery of the cigarettes, so as to constitute *prima facie* evidence of such an allegation. Each of the subsequent allegations referring to the second defendant are pleaded as against "the First Defendant and/or Second Defendant".

94 Accordingly, 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 in establishing the case against the second defendant.

95 Accordingly, I dismiss the case as against the second defendant.

96 The plaintiff asks that I impose the maximum penalty for each offence and refers me to the decision in ***L Vogel & Son Pty Ltd v Anderson*** (1969-1970) 120 CLR 157, affirming the decision of Kitto J at first instance. Kitto J said, at 164 - 165:

> "Consideration of the maximum penalties in a case to which s 240 applies gives little assistance, if any, in deciding what penalty is appropriate to particular circumstances. Though the defendants' fraudulent conduct has been continuous the amounts of duty evaded have varied greatly, being in some instances very substantial and in others comparatively small. All things considered I think that upon each charge of smuggling there should be a penalty of four times the amount of the duty evaded or intended to be evaded, and it will then be sufficient to impose minimum penalties in respect of the other offences."

97 The plaintiff seeks, *inter alia*, an order that the defendants each pay an aggregate penalty of $700,000 in respect of 35 contraventions of s 61 of the *Excise Act 1901*; $35,000 in respect of 35 contraventions of s 114D(1)(a) of the *Customs Act 1901*; $175,000 in respect of 35 contraventions of s 116(2)(a) of the *Customs Act 1901*; $175,000 in respect of 35 contraventions of s 234(1)(d)(i) of the *Customs Act 1901*; a total of $1,085,000 each by way of penalty (in addition to the sum of $428,354.88 claimed in Action CIV 1157 of 1998 as duty).

98 There is no evidence before me as to the financial position of the first defendant, save for his statement that the Customs investigation caused the collapse of his business and that he has been unable to afford to employ a lawyer to appear for him in the present case. The various penalties sought by the plaintiff are the maximum penalties provided for in the relevant Act. In assessing an appropriate penalty in the present case, I have regard to the fact that each of the 35 groups of offences (against s 61 of the *Excise Act 1901* and against s 114D(1)(a), s 116(2)(a) and s 234(1)(d)(i) of the *Excise Act/Customs Act 1901* respectively) was part of a single criminal exercise designed to obtain goods from bonded warehouses for sale within Australia in circumstances where no duty was

paid for those goods. In my opinion, although the first defendant has, in my judgment, committed each of the offences alleged against him, the penalty in each case should take into account that there were, in fact, 35 criminal exercises rather than 140 such criminal exercises.

99 In the circumstances, I consider that an appropriate aggregate penalty of $122,500 should be imposed on the first defendant. That will be arrived at as follows:

100 In respect of each of the 35 offences against s 61 of the *1901*, I impose a penalty of $1,500. In respect of each of the 35 offences against s 114D(1)(a) of the *Customs Act 1901* , I impose a penalty of $500. In respect of each of the 35 offences against s 116(2)(a) of the *Customs Act 1901*, I impose a penalty of $750. In respect of each of the 35 offences against s 234(1)(d)(i) of the *Customs Act 1901*, I impose a penalty of $750. There will be judgment in favour of the plaintiff as against the first defendant as prayed in pars 1 to 9, inclusive and 11, with the penalties assessed, however, as stated above.

CIV 1157 of 1998

101 The result of this action will follow that of the preceding action. In the result, I award judgment in favour of the plaintiff against the first defendant in the sum of $428,354.88.

102 The question of interest was not debated before me and I make no order in respect of interest.

103 The plaintiff is entitled to the costs of the action.

ANNEXURE D

Judgement of CEO of Customs v Amron

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

No. 7159 of 1999

CHIEF EXECUTIVE OFFICER OF CUSTOMS — Plaintiff

v

ALEX AMRON (also known as Aly Astta) — Defendant

JUDGE:	McDonald J
WHERE HELD:	Melbourne
DATE OF HEARING:	13, 19 September and 9 October 2001
DATE OF JUDGMENT:	23 October 2001
CASE MAY BE CITED AS:	Chief Executive Officer of Customs v Amron (No 2)
MEDIUM NEUTRAL CITATION:	[2001] VSC 404

CUSTOMS AND EXCISE, Penalty; offences substantially contemporaneous and connected; previous convictions of defendant taken into account

Customs Act 1901, ss. 233(1)(a); 234(1)(d)(i); 255(1)(4)(a).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms H. Riley	Australian Government Solicitor
For the Defendant	No Appearance	

HIS HONOUR:

1 In these proceedings on 9 October 2001 I gave judgment and declared:

(1) that on or about 9 February 1999 the defendant committed the offence of smuggling contrary to s. 233(1)(a) of the Customs Act 1901 by evading custom's duty of $37,632.81 payable on a quantity of cigarettes;

(2) that on or about 9 February 1999 the defendant committed the offence of knowingly making a statement to an officer of customs which was false or misleading in a material particular contrary to s. 234(1)(d)(i) of the Customs Act 1901.

On that day I ordered:

(1) that the defendant be convicted of the offence of smuggling cigarettes on or about 9 February 1999 contrary to s. 233(1)(a) of the Customs Act 1901;

(2) that the defendant be convicted of the offence of knowingly making a statement to an officer of customs on or about 9 February 1999 which was false or misleading in a material particular contrary to s. 234(1)(d)(i) of the Customs Act 1901.

I now turn to consider what monetary penalty should be imposed on the defendant having regard to the fact that he has been convicted of each of the aforesaid offences.

2 Pursuant to s. 233AB(1)(a)(i) of the Customs Act 1901 as amended by s. 12 of the Customs Legislation Amendment (Criminal Sanctions and Other Measures) Act 2000, which came into effect on 26 May 2000, the penalty for the offence of smuggling is provided as follows:

> (1) Where an offence is punishable as provided by this sub-section, the penalty applicable to the offence is:
>
> (a) Where the Court can determine the amount of the duty that would have been payable on the smuggled goods to which the offence relates if those goods had been entered for home consumption:

(i) where the date on which the offence was committed is known to the court - that date;...

(ii) where that date is not known to the Court - the date on which the Prosecution for the offence was instituted;

a penalty not exceeding five times the amount of that duty."

The amount of the duty that would have been payable on the goods smuggled by the defendant on or about 9 February 1999 had the goods been entered for home consumption is $37,632.81. Accordingly, the maximum penalty for the offence of smuggling in respect of which the defendant has been convicted is $188,164.05.

3 Before s. 233AB(1)(a)(i) and (ii) were so amended the penalty for the offence of smuggling provided for a minimum penalty which was a penalty of not less than two times the amount of the duty that would have been payable on the goods smuggled. The amendment removed that minimum penalty. Although the amendment by its operation commenced at a time subsequent to the defendant's commission of the offence of smuggling, the effect of s. 4F(2) of the Crimes Act (C'th) is that the amendment is applicable to this case as the penalty is to be imposed by the Court at a time subsequent to the commencement of the amendment.

4 As to the second offence in respect of which the defendant was convicted, under s. 234(1)(d)(i) of the Act, by s. 234(3) of the Act it is provided:

"(3) Where a person is convicted of an offence against paragraph 1(d) in relation to a statement made or an omission from a statement made, in respect of the amount of duty payable on particular goods a court may in relation to that offence impose a penalty not exceeding the sum of $5,000 and twice the amount of the duty payable on those goods."

Accordingly, the maximum penalty that may be imposed in respect of this offence shall not exceed the sum of $5,000 and twice the amount of the duty payable on those goods.

5 The custom's duty that was payable by the plaintiff on the toilet tissue together with

the custom's duty payable on the cigarettes which were imported by the defendant total $37,869.72. The defendant paid, or caused to be paid, custom's duty on the importation the sum of $316.22. In consequence of the defendant knowingly making a statement to an officer of customs in the Entry for Home Consumption which was false or misleading, when account is taken of the custom's duty paid by him on the importation, the duty not paid on the goods imported by the defendant was $37,553.50. It is that sum which it is appropriate to have regard to when considering the monetary penalty which should be imposed on the defendant on him being convicted of the offence against s. 234(1)(d)(i) of the Customs Act. Accordingly, any penalty imposed on the defendant following this conviction must not exceed the sum of $80,107.

6 The facts surrounding the commission of the offences for which the defendant has been convicted are set out in my judgment delivered on 9 October 2001. The defendant on or about 9 February 1999 knowingly made a statement to an officer which was false or misleading in that the Entry for Home Consumption stated that, in part, the importation contained toys when it did not whereas the importation included cigarettes which were omitted from the Entry. The Entry for Home Consumption was false or misleading and the defendant knowingly made a statement to an officer that was false or misleading in that in the Entry for Home Consumption it stated that the total custom's duty payable in respect of the importation was $316.22 when, in fact, when account was taken of the cigarettes included in the importation, the total customs duty payable on the importation was $37,869.72. The defendant knowingly made a statement which was false or misleading to an officer of customs by the Entry for Home Consumption for the importation as part of the process by which he smuggled the cigarettes by importing the same with intent to defraud the revenue.

7 In Vogel & Son Pty Ltd v Anderson[1] the appellant was charged with committing several offences against s. 234 of the Customs Act 1901. Those offences included the

1 [1996] 120 CLR 157.

evasion of duty, contrary to paragraph (a); the presentation of documents purporting to be genuine invoices which were, in fact, not genuine invoices contrary to paragraph (c), the making of entries which were false in a particular, contrary to paragraph (d) and producing to an officer a document containing a statement that was untrue in a particular, contrary to paragraph (e). The appellants admitted that they were guilty of 83 offences against s. 234 of the Act. They were further charged with having committed 19 offences of smuggling goods contrary to s. 233(1)(a) of the Act. On the facts before the trial judge, Kitto J, he concluded that on each charge of smuggling the defendants should be convicted and that the appellants also should be convicted of all offences charged.

8 When considering the question of penalty Kitto J[2] said:

> "The customs laws represent the judgment of Parliament upon an important aspect of the economic organisation of the community, and the object of the penal provisions is to make that judgment as effective as possible. It is important to remember that customs officers have of practical necessity to rely extensively upon the information supplied to them by importers, for the flow of commerce could not be maintained if every importation had to be fully investigated. Moreover, detection of frauds is not always easy. No doubt ordinary conceptions of honesty and of civic responsibility suffice to ensure a great deal of fair dealing with the customs, but for some people little seems to matter but the fear of the consequences of discovery. The Customs Act makes those consequences potentially drastic. It is for the courts to make them, in suitable cases, drastic in fact, or otherwise traders who are not saved by qualms of conscience from willingness to defraud their fellow citizens may weigh the profits they hope for against the penalties they have cause to fear and find the gamble worthwhile."

9 On appeal it was contended that Kitto J was in error to convict the appellants of all the offences charged in relation to each series of transactions. On dismissing that ground of appeal, the Court held[3] that although it had been said on behalf of the defendants at trial that, "in each case the importing with intent to defraud the revenue, the presentation of a false invoice as genuine, the making of a false entry and the production of a document or documents containing an untrue statement or

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2 At p. 164
3 At p. 168

untrue statements were merely steps by which the ultimate offence of evading payment of duty was committed", the observations of Kitto J were unanswerable when he said[4] that, "each step was undoubtedly one of a connected series of steps, but each was a separate and distinct piece of conduct for all that, and each involved its own deliberate contravention of the Act". However, as is relevant to the matters under consideration at this time, on appeal the Court said:[5]

> "... we agree that, in determining the appropriate penalties to be imposed in respect of the numerous offences, it was material to take into consideration - as his Honour did - that though the offences in each group were separate offences in law they were substantially contemporaneous and connected."

In the circumstances of this case the offence committed by the defendant under s. 234(1)(d)(i) of the Customs Act in that he knowingly made a statement to an officer which was false or misleading in a material particular was substantially contemporaneous and connected with the further separate offence committed by the defendant of smuggling the cigarettes.

10 Section 16A of the Crimes Act 1914 (C'th) sets out matters to be had regard to and general principles to be observed in determining the penalty to be imposed on the defendant consequence upon him being convicted of a federal offence. Those matters include the matter of general deterrence[6].

11 One of the matters to be taken into account in determining the penalty to be imposed on the defendant is the character, the antecedence of the defendant. There was, tendered on behalf of the plaintiff, three certified extracts of the Magistrates' Court of Victoria at Melbourne from the Registrar of that Court on 9 April 1998. In each case the informant was stated to be "Schindlauer, Barbara" and the defendant was stated to be, "Astta, Aly". It is apparent from the extracts that the surname of the informant and defendant in each case is the name stated first. As to the first extract, it is stated that the "defendant" was charged that at St Albans on or about 18 September 1997 he

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4 At p. 161
5 At p. 168
6 Director of Public Prosecution (C'th) v el Karhani (1990) 97 ALR 373.

committed a breach of s. 35 of the Excise Act (C'th), in that he manufactured excisable goods without a licence. It appears from the extract that the "defendant" pleaded guilty to the charge and that with conviction he was fined $750.00 with $412.50 costs. As to the second extract, it appears that the "defendant" was charged that at St Albans on or about 18 September 1997 he committed a breach of s. 117 of the Excise Act in that he had in his possession excisable goods. As appears from the extract the "defendant" pleaded guilty and that with conviction he was fined $500.00 and an order was made for the forfeiture and disposal of goods. From the third certified extract the "defendant" was charged that at St Albans on or about 18 September 1997 he committed a breach of s. 120(1)(iv) of the Excise Act in that he evaded payment of duty which was payable. From the extract it appears that the "defendant" pleaded guilty and that with conviction he was fined $5,000 and ordered to pay $780.91 compensation.

12 The question that arose having regard to the three convictions as appearing from the certified extracts was whether the defendant, the subject of those three convictions, was the defendant in these proceedings. At the time that the defendant in these proceedings was interviewed by customs officer, Brereton, there was also in attendance customs officer, Des Seear. That fact appears from the transcript of the interview tendered in the proceedings. At an early point in the interview the defendant gave his name as Alex Amron and when asked whether he was known by any other name, he answered "Aly Astta" and further said that he was not known by any other name. The defendant said that he was formerly known by the name Aly Astta but he had changed his name to Alex Amron. On the hearing of these proceedings relevant to penalty, Seear gave evidence that he was formerly employed by the Australian Customs Service and that he was in attendance when the defendant was interviewed on 12 February 1999 relevant to the present proceedings. Seear, on 24 October 1997, interviewed Aly Astta relevant to the charges laid, the subject of the aforesaid three certified extracts. At that time the person interviewed by him gave his name as Aly Astta. Seear gave evidence to this Court that the person who was interviewed on 12 February 1999 in respect of these proceedings

and who called himself Alex Amron was the same person that he had interviewed on 24 October 1997 and who was charged with the offences the subject of convictions as stated in the certified extracts. He also said that in the course of the interview on 12 February 1999 the defendant, Alex Amron, said that he was previously known as Aly Astta, as appears from the transcript of that interview.

13 There was also tendered on behalf of the plaintiff on this hearing interrogatories 1(a), (b) and (c) delivered on behalf of the plaintiff for the examination of the defendant and the defendant's answers thereto. By these answers the defendant deposed that he had changed his name from Aly Astta to Alex Amron on or about 19 March 1998 by completing the appropriate change of name forms in the Victorian office of Births Deaths and Marriages and that he had not ever been known by any other name. I am satisfied that the defendant in the present proceedings, Alex Amron, is the same person who was convicted and fined by the Magistrates' Court of Victoria at Melbourne on 9 April 1998 under the name of Aly Astta as set out in the three certified extracts.

14 There was also called as a witness on the proceedings as to penalty, Barbara Schindlauer who was the informant in the proceedings before the Magistrates' Court on 9 April 1998. She is employed as an investigations officer by the Customs Office. She said that the charge brought against the defendant on which he was convicted on 9 April 1998, that he committed a breach of s. 35 of the Excise Act was, in particular, that he had, on or prior to the 18th day of September 1997 at 7 Cordelia Grove, St Albans in the State of Victoria, contrary to s. 35 of the Excise Act 1901, manufactured excisable goods, namely tobacco, without a licence granted under that Act. As to the charge relating to the second conviction she said, that it was that the defendant had possession, custody or control of manufactured or partly manufactured goods, namely tobacco, without the appropriate licence. She said that with respect to the third conviction, the charge was that the defendant, contrary to s. 120(1)(iv) of the Excise Act, evaded the payment of duty which was payable. Barbara Schindlauer gave further evidence that at the hearing before the Magistrates'

Court the defendant pleaded guilty to each of the offences and that there was read to the Court a summary of matters relevant to the offences which she said the defendant accepted as a fair summary of the facts. It is sufficient to say that each of the matters the subject of the convictions concerned the possession and manufacture of tobacco goods and the failure to pay and evasion by the defendant of payment of duty which was payable on tobacco goods.

15 For the purpose of determining the appropriate penalties to be imposed on the defendant with respect to the two convictions before this Court and as relevant to his character and antecedence I take into account the fact that the defendant was on 9 April 1998 at the Magistrates' Court of Victoria at Melbourne convicted of the aforesaid three offences. Those offences were committed in September 1997 and the defendant was convicted in April 1998, less than a year before the offences relevant to these proceedings.

16 At no time during the trial of the proceedings or on delivery of judgment or on the hearing relevant to penalty did the defendant appear. To the extent that it is necessary to have regard to such matters as the age, means, and cultural background of the defendant, that which is known by me relevant to those matters is that to be obtained from his record of interview. The defendant was born on 1 October 1958 and is presently 43 years of age. He is an Australian citizen, having resided in Australia for over 18 years. At the time of being interviewed on 12 February 1999 he was a married man and his occupation was that of a wholesaler, selling and buying goods and selling and buying imported goods. Other than that no personal circumstances of the defendant are known to the Court. The fact that the defendant was a wholesaler of goods, it is to be concluded that he expected to profit by his conduct which led to him being convicted in these proceedings, had that conduct not been detected because he would have imported cigarettes without paying customs duty on the same.

17 Each of the offences on which the defendant has been convicted are serious offences. Each offence committed by the defendant concerned the commission of a deliberate

act by him. It would appear that notwithstanding that the defendant had been previously convicted of three offences under the Excise Act, in the circumstances of this case he was willing and prepared to take the gamble that it would not be discovered that he had knowingly made to an officer a false or misleading statement, on the Entry for Home Consumption, and that it would not be discovered that he imported the cigarettes. He did this with intent to defraud the revenue. At trial Marianna said that on the scale of very rare to very common it was very rare for shipping containers to be opened and examined by customs officers. One would expect that to be the case for otherwise as said by Kitto J in Vogel & Son Pty Ltd v Anderson at p. 164:

> "The flow of commerce could not be maintained if every importation had to be fully investigated."

It is appropriate in such a case as this that not only should I have regard to the matter of general deterrence when fixing the appropriate penalty to be imposed on the defendant which I do, but I should also have regard to the deterrent effect that the order I make should have on the defendant.

18 The two offences on which I have ordered the defendant be convicted, while being separate offences in law, they were connected and the conduct of the defendant leading to his conviction was "substantially contemporaneous". However, it is necessary for me to ensure that the severity of the sentence is appropriate to the conduct of the defendant in respect of which he has been convicted. I regard the offence of smuggling as the more serious offence of the two on which the defendant has been convicted. The conclusion that I have reached is that for the offence of smuggling there should be imposed on the defendant a monetary penalty of $90,000. I have also concluded that with respect to his conviction under s. 234(1)(d)(i) of the Customs Act, when taking into account that the defendant's deliberate conduct led to his conviction for this matter but it was substantially contemporaneous and connected with conduct in respect to which the defendant was convicted of smuggling, the monetary penalty that should be imposed on him for this offence is $10,000.

19 Accordingly, it is ordered:

(1) that with respect to the conviction of the defendant of the offence of smuggling contrary to s. 233(1)(a) of the Customs Act 1901 it is ordered that the defendant pay to the plaintiff a monetary penalty of the sum of $90,000;

(2) that with respect to the conviction of the defendant of the offence of knowingly making a statement to an officer of customs which was false or misleading in a material particular contrary to s. 234(1)(d)(i) of the Customs Act 1901 it is ordered that the defendant pay to the plaintiff a monetary penalty of $10,000.

In these proceedings the plaintiff has sought an order for costs. Pursuant to s. 24(1) of the Supreme Court Act 1986 the Court is vested with a discretion as to costs in a civil proceeding. The present proceedings, although in the nature of a customs prosecution, they are brought in accordance with the practice and procedure of the Court in civil cases. In a case such as the present costs may be awarded as in civil proceedings. In my view in the circumstances of this case there is no reason why costs should not follow the event. In my view the plaintiff's costs of the proceedings should be paid by the defendant. Accordingly, I further order:

(3) That the defendant pay the plaintiff's costs of the proceedings.

ANNEXURE E

Paragraph 13.48 of ALRC No.95

13.46 Averments are only allowed for matters of fact not intent.[53] This distinction can prove difficult for courts to determine. In the recent case of *Chief Executive Officer of Customs v Amron*,[54] considerable attention had to be given to the difference between averments of matters of fact and matters of intent.[55]

13.47 It acknowledged that averments are 'a substantial qualification to the fundamental principle that, in criminal prosecutions, the onus should lie on the prosecution.'[56] However, the ALRC recognised a need for their use in relation to some Customs prosecutions, particularly when evidence is located overseas or where the matter in the averment is non-controversial and would not cause unfairness to the defendant.

13.48 But it noted that they are open to abuse and accordingly suggested they should be subject to judicial control at the pre-trial stage so the need for them could be ascertained.[57] The ALRC supported the retention of s 255 of the *Customs Act* allowing for the use of averments by the prosecutor but with the addition of a provision for the disallowance of averments where the court considered that their use would be unjust to the defendant.[58] The ALRC further recommended the inclusion of criteria that the court could 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 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.[59]

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53 A Shaik, 'Procedures in "Customs Prosecutions" and "Excise Prosecutions"' (2000) 7 *Australian Journal of Administrative Law* 131, 133. Section 13.6 of the *Criminal Code* states that a law that allows the prosecution to make an averment is not taken to allow the prosecution to aver any fault element of an offence or to make an averment in prosecuring for an offence that is directly punishable by imprisonment.

54 *CEO of Customs v Amron* [2001] 164 FLR 209.

55 For example, McDonald J found that the averment that the defendant deliberately omitted from the Customs Entry a statement that the import contained cigarettes was an averment of fact relevant to the issue as to whether the importation was made with intent to defraud. 'However, the averment that the defendant knew that the statement of facts were false cannot be relied on with respect to such charge as that averment is an averment of the mental element or state of mind of the defendant which must be proved by the plaintiff in order to establish that the defendant committed the offence': ibid, 217.

56 Australian Law Reform Commission, *Customs and Excise Volume II*, ALRC 60 (1992), ALRC, Sydney, para 12.12.

57 Ibid, para 12.11.

58 Ibid, para 12.12.

59 Ibid.