Submission 7

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The Committee Secretary
House of Representatives
Standing Committee on
Legal and Constitutional
Affairs
Parliament House
CANBERRA A.C.T. 2600

For Attention Ms. Frances Gant

Dear Ms. Gant

Re: Inquiry Into Averment Provisions in Australian Customs Legislation

I refer to previous correspondence and telephone conversations regarding serious problems arising out of misuse of averment provisions and other improprieties in the Customs Commercial Investigation Section. On 25th July, 2003, I faxed to you a draft outline of a specific miscarriage of justice by means of averments and undertook to provide a final submission as soon as possible.

I apologise for the delay which resulted from a recalcitrant computer and other pressures.

My computer problems have caused me to partly re-draft the covering summary originally faxed to you entitled "Summary of the "Pearson" Matter In So Far as 'Averments' are Concerned" but it may be that the current version is more explicit than the original draft. I have deliberately minimized the annexures as a complete set such as has been forwarded to the Attorney-General is quite large and covers other irregularities by Customs not directly relevant to averments.

I repeat my comments that the legacy of the Midford Paramount Affair is still the subject of considerable cover-up and suggest that your Committee seeks expanded terms of reference to investigate other matters which remain unresolved.

Yours faithfully

R.J.Benson - Solicitor

SUMMARY OF THE "PEARSON" MATTER IN SO FAR AS "AVERMENTS' ARE CONCERNED

This was a complex matter involving imported commercial washer extractors and attempts by Customs Officers to illegally "protect" a local manufacturer of domestic washing machines the quality of which had so deteriorated that it was feared that some people would be prepared to pay the vastly more expensive prices for the imported machines rather than purchase the defective and short-lived local product.

Customs originally alleged that the imported machines were domestic types but this untenable assertion was disposed of by the Federal Court. Other "fallback" arguments were advanced and pursued with varying degrees of determination. Ironically, the most spurious argument which was unsupported by admissible evidence became the platform on which convictions were obtained by means of averments.

Annexure "A" contains more detailed summaries in case the foregoing is not sufficiently complete.

Customs initially alleged that findings by the Administrative Appeals Tribunal and the Federal Court (each of which had no admissible evidence on which to base their findings) constituted decisions-in-rem which "precluded" the defendants from leading admissible evidence to prove their innocence. That assertion was adopted by the Local Court and Hosking DCJ in the District Court but was emphatically rejected by the Court of Criminal Appeal in considerable detail.

The only remaining point on which Customs could rely was the possibility of remedying their total lack of evidence (described by the Court of Criminal Appeal as a "dearth of evidence") by means of amending their Informations with a new averment even though the prosecution had long since closed its case. Annexure "B" is a copy of the discussion of averments by the Court of Criminal Appeal but there was some *obiter dicta* which suggested that a certain form of amendment might rescue the prosecutions for Customs despite the fact that the defendants had been prevented from leading admissible evidence to prove that they had correctly duty paid their goods. When the matter returned from the Court of Criminal Appeal to the District Court the prosecution attempted to amend the relative averment and did so

in two parts as is set out in Annexure "C". It now seems that the first part of the proposed amendment was sought to camouflage the illegality of the second part which still incorporated a prohibited averment of law.

Proposed amendment 6 (a) was never in issue and had been agreed to from the very beginning. The deliberate intent to mislead as regards proposed amendment 6 (b) is suggested by the fact that the Prosecutor did not seriously press it whereas he had vigorously pressed every other point in the prosecution. Abandonment of 6 (b) left the Prosecutor without any evidence as to the identity of the relevant "cylinder". Annexure "C" is part of the transcript which also shows that the Prosecutor abandoned his attempt to include Averment 6 (b).

As the position then stood, the prosecution had failed to establish a *prima facie* case and the informations should have been thereupon dismissed but Hosking DCJ not only refused to follow this course but refused to hear rebuttal evidence in the unlikely event that the partial amendment had some effect. Section 255 (2) (a) implies that rebuttal evidence may be given but does not specify when. Obviously, it cannot be given until after the incorporation of an averment in the charges but the refusal by Hosking DCJ to permit rebuttal evidence in this case suggests that the legislation could be made clearer still on this point.

Provisions in the *Justices Act (N.S.W)* prevented further appeal in the more orthodox manner even when Hosking DCJ acknowledged that he had ignored a vital part of the directions from the Court of Criminal Appeal. It will be seen that subsequent attempts to utilise an indirect form of appeal based on the refusal of Hosking DCJ to accord procedural fairness was blocked by the prosecution.

In order to demonstrate the difficulties that the particular averment encountered in this situation it is first necessary to quote the relevant part of the Tariff Concession Order which applied to Pearson's machines bearing in mind that the machines were found by the Full Federal Court to be commercial and not domestic; this distinction brings into play different commercial understandings and terminology and only the understandings and terminology of the commercial trade are relevant here. The applicable law here is complex and esoteric but can be demonstrated if so desired.

The relevant part of the formula in the Order is as follows:

"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"

Since commercial washing machines have only one cylinder but commercial washer extractors have two, it is readily apparent that a latent ambiguity arises as to which is the relevant cylinder in washer extractors for the purposes of the deeming formula; the Federal Court agreed that the machines in question were "washer extractors". On this and other agreed facts, if it could be proved that the inner cylinder (sometimes called the "basket") was the relevant cylinder, then the prosecution had overcome one of its hurdles but if the outer cylinder was relevant, the charges must be dismissed then and there since its capacity was sufficient to comply with the Order and the correct amount of duty was paid.

Because Pearson was charged with evading duty which was payable, even if the relevance of the inner cylinder (basket) could be proved (and clearly it could not) the prosecution still faced the difficulty of proving that no other alternative classification which produced a greater rate of duty than the Order provided (2%) applied. There was an obvious alternative classification which produced the same rate of duty as the Order but the prosecution failed to address this alternative (despite being on notice of this alternative defence) so the question of averments does not arise if the alternative defence was called in question. However, the prosecution failed (did not attempt) to negative this alternative and, therefore, failed to prove that any duty was evaded.

At this stage, the position may be summarized as follows as far as the Tariff Concession Order is concerned. The identification of the "cylinder" referred to in the deeming provisions of the Order is critical to Pearson's primary defence. If the outer cylinder is shown to be the relevant cylinder, then the prosecution should have failed at this point.

In the Federal Court, Wilcox J. offered a method of determining the relevant cylinder. He said:

"It is true that the external casing of the Maytag machine may appropriately be described as a "cylinder" although it is not precisely of cylindrical shape. But the same comment may be made about the basket. Given the choice between two objects, each of which may loosely be described as a cylinder, it makes more sense to select the one whose volume actually determines the washing capacity of the machines." (emphasis added)

Note: In an appeal from the Administrative Appeals Tribunal, the Federal Court had no fact finding jurisdiction.

From the beginning of the prosecution, the Prosecutor refused to call evidence to identify the cylinder which "actually determines the washing capacity of the machines". He said:

"My friend talks about remedying the matter. It is not my intention. I have not the slightest inclination at all to run this as a tariff concession case and to start calling evidence from experts..... ....."

One would expect that since the prosecution, had declined to call defining evidence, no *prima facie* case had been established but, if an onus of proof of innocence was on Pearson, the way was open for Pearson to call the required evidence as several qualified witnesses were available or on standby but the Prosecutor managed to persuade the presiding Magistrate and Judge that Pearson was "precluded" from calling this evidence. Subsequently, the Court of Criminal Appeal ruled that this "preclusive" approach was wrong in law but when the matter was returned to Hosking DCJ, his Honour declined to follow the directions of the Court of Criminal Appeal and maintained his decision not to hear Pearson's evidence while acknowledging that he had not followed the Superior Court's decision.

When the matter came back before his Honour, the position was that there was no evidence to assist in identifying which cylinder was referred to in the Tariff Concession Order. Customs attempted to fill this evidentiary gap by seeking to add a new averment notwithstanding that they had long since closed their case. Annexure "C" is a copy of the transcript where amendment to insert a new Averment was attempted. The proposed new averment was sub-divided into two parts and was to read:

"6 (a) *The subject washing machines* have an inner cylinder, to wit a spin drying basket, which cylinder has a volumetric cylinder capacity of less than 100 litres*.*"

NOTES 1. The description "washing machines" seems to be deliberately misleading especially in view of the decisions in the Federal Court. The machines are clearly commercial washer extractors as described in the Tariff Concession Order.

2. The capacity of the basket was never in dispute and had been agreed from the outset. This seems to be a misuse of the proposed averment designed to confuse the Judge and it seems to have done just that.

"6 (b) *The subject washing machines * have a volumetric cylinder capacity of less than 100 litres, which figure when divided by 10 for the purposes of calculating the dry linen capacity pursuant to Tariff Concession 8530085, gives a figure of less than 10.*"

NOTES 1. Again, the misdescription of the machines as washing Machines and not washer extractors seems to be an attempt to confuse the Court by repetition.

2. This proposed averment does not directly purport to identify the relevant "cylinder" but seeks to do so by inference.

In the absence of evidence to guide in the interpretation of the word "cylinder" in the Tariff Concession Order, the proposed Averment 6 (b) must be an averment of pure law which seeks, indirectly, to interpret a word in subordinate legislation so as to define which is the relevant cylinder; this is not allowed. This point was argued before Hosking DCJ and, eventually, the Prosecutor conceded his error and withdrew his application to amend his averments by inserting 6 (b).

In summary, the potential misuse of averments successfully used on this occasion has brought about a miscarriage of justice. It is conceded that

considerable blame must lie with the presiding Judge who should have realized what the position was but his confusion (and obvious prejudice against Pearson) was deliberately fostered by the Prosecutor.

Generally, the use of averments is overtaken by evidence subsequently led but when there is "a dearth of evidence" as the Court of Criminal Appeal noted in this case, this safeguard is removed.

Of even more concern is the ability of the prosecution to amend its averments "at any time" and certainly long after the prosecution has closed its case thus permitting "trial by ambush". In the Pearson matter an ambush aided by Hosking DCJ, was fatal to Pearson. The combined effect of the *Justices Act (N.S.W.)* and the tactics by the prosecution in opposing review of the procedural fairness issue left only an application for pardons on the basis of wrongful conviction; This course has been adopted and applications have been made to the Attorney-General on a much wider basis including other grounds. A decision is pending.

'A.'

PEARSON

- Pearson commenced importing "Maytag" laundry machines in 1986. He engaged Ray Katte of Cridland Katte Customs Agency to advise him on Customs clearances. Mr. Katte had some previous personal knowledge of such machines and asked Pearson to measure the contents of the outer cylinder of the machines now in issue.
- Pearson advised Katte (correctly) that the contents were 102 litres and Katte then said that they were subject to duty at the rate of 2% under TC 8530085. In doing so, Katte was of the firm opinion (since confirmed by many experts) that the outer cylinder was the relevant cylinder for this T.C.O.
- Customs later disputed whether the machines were commercial types or really domestic and a dispute was finally settled in favour of Pearson on this point in the Federal Court.
- During the earlier hearing of the dispute in the Administrative Appeals Tribunal, Customs had suggested that the inner cylinder might be the relevant cylinder but this was not pressed or followed by evidence or serious argument by either side.
- Independently and without assistance from the parties, the Tribunal came to the conclusion that the inner cylinder was the relevant cylinder as a question of fact but was clearly wrong in the light of subsequent evidence. However, being a finding of fact, it could not be challenged in the Federal Court. As a result, duty at the rate of 15% was ostensibly payable unless the Tribunal's finding of fact was corrected or unless the machines were classifiable under Item 84.40.9 which the Tribunal and the Federal Court had not ruled on. This latter point was not pursued in the Federal Court which had no jurisdiction to make findings of fact. The Full Federal Court did make observations which would inevitably lead to classification under Item 84.40.9 and dutiable at 2% but lacked the jurisdiction to make a formal finding in favour of Pearson.
- There were other provisions which also made the goods dutiable at the rate of 2% and Pearson's Customs Agent subsequently obtained refunds of duty on later shipments. However, there was a hiatus caused by the introduction of the 1988 tariff and a T.C.O. (No. 8636141) which had been invalidly created. This left 6 shipments on which duty could only be only refundable under then Tariff Item 84.40.9 unless the error of fact in the Tribunal could be corrected. However, by this time, prosecutions were commenced and refund applications were not lodged.
- Prosecutions were launched despite provisions in the "Prosecutions Policy of the Commonwealth" and despite general recognition that Tariff classification is frequently difficult and mistakes should not usually be prosecuted. In this case, many of the mistakes had been made by Customs Officers which illustrates the degree of difficulty.
- In the Local Court, Customs argued that the combined facts from the Tribunal and the decisions of the Federal Court constituted "decisions in rem" which were final and precluded Pearson from leading any evidence to defend himself. The Court agreed with this submission and Pearson was inevitable convicted.
- On appeal de novo to the District Court, the same arguments were raised and, again, were accepted by the Court. However, before the Court could convict, a Stated Case to the Court of Criminal Appeal was obtained on questions of law.
- The Court of Criminal Appeal (3 judges) found in favour of Pearson on all substantive points. It rejected the "decision in rem/ preclusive effect" submission by Customs, ruled that the findings of fact by the Tribunal were inadmissible in the prosecution and ruled that an averment on which the prosecution relied was ineffectual and that there was a "dearth of evidence" especially on the question of classification under Item 84.40.9 which would be a complete defence. Clearly, a person cannot be convicted on a dearth of evidence but the Court of Criminal Appeal had no jurisdiction on a Stated Case to direct acquittal.

- When the matter was returned to the District Court, the presiding judge adopted a very aggressive attitude to Pearson's counsel and refused to hear his address on the effect of the decision of the Court of Criminal Appeal. He also refused to allow him to lead the expert evidence which he had formerly rejected. The Judge seemed to rely on a phrase taken out of context in the decision of the Court of Criminal Appeal, namely, that he could follow the Federal Court decision. His error was in not separating the decision from the facts found in the Tribunal which he had been instructed not to follow and in also not having regard to the alternative defence of classification under Item 84.40.9.
- The convictions imposed by the District Court could not be appealed further under State legislation except through Section 474D of the Crimes Act (N.S.W.) but it was first necessary to exhaust all indirect remedies. Consequently, an application for an order of certiorari was sought but failed due to a lack of evidence before that Court. An application to the High Court for special leave found a degree of favour with Gaudron J. being very critical of the position. However, that Court conducts a heavy screening of applications because of its limited capacity (about 100 cases per year) and leave was refused by a majority. Compared to most applications, this was a credible effort.
- Pearson and his Agent are clearly innocent for reasons set out in the application to the Supreme Court and as advised by Mr. R.W.R. Parker Q.C. They have, at all times, been denied "a hearing on the merits". Advice to the contrary from an officer in the Australian Government Solicitor's Office can be demonstrated to be untrue.
- The effect on Mr. Pearson has been catastrophic. It aggravated a heart complain which led to early retirement and has cost him well in excess of $500,000.00 which, in turn, has reduced his living standard in retirement. In addition, after a lifetime of exemplary conduct (no convictions) he now has multiple convictions which he has, in certain cases to disclose) which can be interpreted as fraudulent dealings. This is a cause of acute embarrassment to him and affects the quality of his life in his declining years.
- At times Customs have alleged dishonesty on Pearson's part and have improperly tried to pursue an allegation related to an advertising brochure after the Local Court dismissed a related charge. They also seek to suggest that Pearson's frank admission that he received Ray Katte's advice as to the correct rate of duty with "joy" as somehow importing fraud. Ray Katte has signed a statement given to Customs in which he fully and freely accepts that the decision to enter the goods as they were was his and the only information from Pearson on which he relied were the specifications of the machines and that the capacity of the outer cylinder was 102 litres (which was later proved to be correct).
- The Customs' case asserts that the goods were wrongly entered because the capacity of the machines was less than 10 kg /batch. The relevant T.C.O. (8530085) included a "deeming" provision to determine capacity and that provision required measurement of the "cylinders". Washer extractors have an outer cylinder and an inner "basket" which could be described as a cylinder; it is used only for spin drying. The officer drafting this Order created a "latent" ambiguity which, if referred to trade experts, is clearly resolved as being the outer cylinder as Mr Katte selected. It is the error of the Administrative Appeals Tribunal which has not been able to be exposed that is responsible for the District Court's decision (apart from other defences that it refused to consider). That error was that the inner cylinder should have been selected.
- The Australlian Customs Service Manual, Volume 18, Page 11 at Paragraph 3 provides that the importer should be given the benefit of the doubt in cases such as this but it has not been applied in this case.

CUSTOMS v COMMERCIAL LAUNDRY MACHINES

Background

The Tariff Concession area in Customs has been making concessional instruments for the smaller industrial laundry machines (both washing machines and washer extractors) as far back as 1980 and earlier. The Customs Investigation Section has relentlessly pursued ("persecuted") the importers of such machinery who utilise these concessions for almost as long despite regular rebuffs in the Administrative Appeals Tribunal (the "A.A.T.) and the Federal Court which bring about temporary pauses.

There has been a succession of concessional instruments replacing earlier instruments varying only slightly from their predecessors. Many of these instruments refer to "dry linen capacity" and/or "cylinder capacity" and, in respect of the Tariff Concession order central to this matter (TC 8530085) a "deeming" note provides that dry linen capacity shall be calculated from the "volumetric cylinder capacity" of the "cylinder". This creates a latent ambiguity in that, while commercial washing machines have only one cylinder, washer-extractors have two namely, the outer cylinder which corresponds to the only cylinder in washing machines and an inner cylinder (known as the "basket") which plays no part in the washing process but is used in the spin-drying cycle. A copy of TC 8530085 is attached hereto.

A copy of the Customs' file on which TC 8530085 was created was obtained under Freedom of Information provisions and shows that it was the intention of the draftsman of the Order that the **outer** cylinder should be relevant for the purposes of the deeming note.

On 30/7/82, Customs, Brisbane ruled that the **outer** cylinder in washer-extractors was the relevant cylinder when determining cylinder capacity. This logical approach gives consistency when compared with commercial washing machines and accords with the understanding of the industrial laundry industry and manufactures of laundry machines. However, the latter, recognising the vagueness of the term "dry linen capacity" tries to avoid the use of the term..

Customs then raised issue as to whether "Maytag" and "Speed Queen" machine are commercial or domestic. In 1982 the issue went to the A.A.T. but Customs lost and their arguments were rejected.

Customs tried again in 1983 (*Re: Lee Mckeand* (1983) 5 ALD 613) and lost again.

Customs in Melbourne then argued that small **coin**-operated machines are domestic (a bizarre idea) but later conceded that they were wrong when the matter was taken to the A.A.T. on an application for review.

In 1987, Customs carried out raids on all importers of "Maytag" and "Speed Queen" machines around Australia. Machines were seized in Queensland, New South Wales, Victoria and South Australia. Prosecutions were commenced but did not proceed to hearing except in New South Wales where Tavemar Pty. Ltd. ("Speed Queen") and

Neil Pearson & Co. P/L ("Maytag") were prosecuted. The prosecution of Tavemar Pty. Ltd. proceeded on orthodox lines and Customs lost - all charges were dismissed. A significant event during the prosecution of Tavemar Pty. Ltd. was the manner in which Customs presented their evidence in the vital aspect of the "volumetric cylinder capacity" of the machines. A Customs officer gave evidence that he had taken the cylinder from a "Speed Queen" machine and had given it to an employee of Email Ltd., a perceived competitor of "Speed Queen". An employee of Email Ltd. then gave evidence that he had measured the capacity of the cylinder and found that it was less than the critical 100 litres. During a recess in the hearing, representatives of Tavemar Pty. Ltd. examined the cylinder and discovered that it was not a genuine part. The Customs Officer was then recalled and admitted that the cylinder was actually from a "Kleen Maid" machine which he said was "similar". However, the similarity did not extend to volumetric capacity and the genuine "Speed Queen" cylinder was significantly bigger and exceeded the critical 100 litres. Complaint at this apparent perjury was made to two senior Customs Officers who promised that their Internal Affairs Section would investigate the irregularity but this was never done despite follow-up reminders.

Prosecution of Pearson was conducted on an artificial basis relying on perceived technicalities accepted by the Magistrate and District Court Judge (Hosking DCJ) but overturned by the Court of Criminal Appeal. Litigation is still continuing at great cost to all primarily because Hosking DCJ declined to follow the instructions of the Court of Criminal Appeal.

Pearson

Pearson commenced to import "Maytag" machines about 1986. He contacted Ray Katte of Cridland Katte Customs Agency; Mr. Katte is held in the highest esteem by all and is a Past President of the agent's Association. Katte asked Pearson to measure the capacity of the outside cylinder and, when told it was in excess of 100 litres, Katte advised his client that "Maytag" Model A512 machines were eligible for concessional entry under TC 8530085 which made them entitled to a rate of duty of 2%. TC8636141 which was published by Customs as current at that time would also have given the same result but had, unknown to the public, been invalidly created because of an error in the Customs Head Office.

In 1987, Katte became aware that Customs were again agitating the concessional issue so he wrote to Customs in Canberra explaining his client's position and seeking rulings. Letters dated 12/10/87, 30/1/88, 3/5/88 and 17/1/89 produced few responses and no rulings. By letter dated 17/1/89, Customs Officer Higgins advised that he recognised a problem but had no solutions.

When Pearson was raided along with all other importers, Katte advised him to resort to the A.A.T., primarily on the commercial/domestic issue but Customs keep adding new grounds in the face of submissions that they are wrong. Customs also advised that TC8636141 which would also result in concessional duty at the rate of 2% was invalidly created by Customs' own fault but Pearson was told he could not rely on it. In the face of criticism, Customs promised to validate the concession order but were so tardy in doing so that a new Customs Tariff was introduced which limited the

extent of retrospective operation of the validated Order thus excluded Pearson's first six shipments.. Pearson did receive refunds of duty based on a 2% rate of duty for imports of identical machines made after 1st January, 1988 and was prosecuted for the first six shipments of identical machines.

The dispute (now on various grounds) was heard in the Administrative Appeals Tribunal before D.P. Bannon sitting alone. The A.A.T. ruled against Pearson on the commercial/domestic issue and made other findings of fact especially as to the relevant cylinder for the purposes of TC8530085. It did this without receiving evidence or hearing submissions from either side or even advising the parties that it was making its own enquiries. Section 33 of the Administrative Appeals Tribunal Act permits such informal enquiries but the Court of Criminal Appeal has ruled that such findings are not admissible in criminal prosecutions such as followed in Pearson's case. However, the Tribunal also held that, had TC8636141 been validly created, it would have applied that concession so as to find in favour of Pearson.

Pearson appealed to the Federal Court on **questions of law** and Wilcox J. found in favour of Pearson on all such points. The A.A.T. opinion regarding the relevant cylinder was not disturbed as the Court had no jurisdiction to deal with facts. Unfortunately, Wilcox J. made comments on the facts found below despite his lack of jurisdiction to find facts or evidence on which a positive finding might be made,. Customs have sought to rely on these observations made without access to evidence. Subsequently, the Court of Criminal Appeal has directed Hosking DCJ not to apply these facts in the Pearson prosecution but His Honour declined to follow the directions of the superior court and Section 146 of the Justices Act (N.S.W.) prohibits a direct appeal from such illegal conduct. An example of such a direction is found on Pages 23/24 of the Court of Criminal Appeal's directions where it is said:

> *"However, Hosking DCJ was perfectly entitled to follow the decisions* ***so long as he appreciated the different evidentiary environment in which the Federal Court judges reached their conclusions."*** *(emphasis added)*

See also the Annexure hereto which sets out other comments by the Superior Court on the relevance of the comments below.

On appeal to the Full Federal Court, Wilcox J's decision was affirmed based on the facts found by the A.A.T. but the selection of the relevant cylinder, being a question of fact, again could not be disturbed in that Court. **However, Wilcox J. had provided a legal formula to identify the relevant cylinder which then needed factual evidence to be applied. The Federal Court had no jurisdiction to make findings of fact so was unable to take the issue to finality.**

The Full Federal Court also expressed the opinion that the machines were **"washer-extractors" which identification would result in the machines being entered at the correct rate of duty (2%) under Tariff Sub-item 84.40.9 but, again, had no jurisdiction to so rule.**

The Prosecution of Pearson

The basis of the Customs prosecution of Pearson is that his Licensed Customs Agent selected the wrong cylinder in machines which are clearly "washer extractors" (i.e. they have two (2) cylinders as previously described). The inner cylinder is of a capacity less than the volume required by TC 8530085 but the outer cylinder is in excess of this volume. Customs have led no admissibile evidence to prove, as **a fact** which is the relevant cylinder and have, so far, been able to prevent Pearson from leading the abundance of evidence to show that his agent chose correctly. This is contrary to all prosecution principles.

The Customs' case also completely ignores the alternate defence available to Pearson (especially in view of an opinion expressed by the Full Federal Court) that the machines are "washer extractors" dutiable at the rate of 2% anyway.

As previously noted, Customs commenced prosecution of both Mr. Pearson and his company in the Local Court with multiple charges for each of six shipments. The prosecutions were contrary to the provisions of the "Prosecution Policy of the Commonwealth". The prosecution deliberately led no evidence of incorrect entry but successfully ran the technical argument that the decisions of the Federal Court were decisions in rem which **precluded** the Defendants from leading exculpatory evidence (then available - a Mr. G. Lindsay was actually sworn as an expert witness but was not allowed to give evidence over technical objections as to relevance taken by Customs). The expert evidence of Mr. Lindsay and others who would have followed him would have shown that Mr Katte had selected the correct cylinder and correctly entered the goods. The Magistrate upheld these Prosecution submissions over objection and convicted both parties on all charges imposing heavy penalties. The Defendants appealed de novo to the District Court.

The appeal came before Hosking DCJ where the same submissions were upheld. The Defendants appealed by way of Stated Case to the Court of Criminal Appeal which, in a lengthy and detailed judgement found that Hosking DCJ had erred and, in any case, was "faced with a dearth of evidence" . Conviction in those circumstances would not seem open. The Court of Criminal Appeal did leave open the possibility that the prosecution might be able to repair its case if it could suitably amend its averments. The Court also held that Hosking DCJ could follow the decision of the Federal Court if he wished provided that he appreciated the "evidentiary environment" in which the Federal Court found itself but, as that Court had made no finding of fact and had to rely on the findings in the Tribunal which were not admissible in the prosecution, he would obviously need to hear the evidence which the Prosecution had previously declined to lead. If cogent evidence was admitted then an obligation arose to permit the defendants to lead contrary evidence which the Defendants had been trying to lead for so long to reach a concluded view as to the correct cylinder. Even then, he would be left with a lack of evidence as to whether the machines were "washer-extractors" dutiable at 2% under Sub-item 84.40.9 in the Customs Tariff in any case.

During the hearing before Hosking DCJ, a senior Customs Officer told a Customs Agent that the prosecution of Pearson was being maintained because he had won the commercial/domestic issue which had, once again, defeated their plans. Later, an even more senior Customs Officer made similar remarks thus indicating mala fides. About this time, Pearson's solicitor asked the solicitor for Customs why these

seemingly reprehensible tactics were being adopted contrary to the Crown's position as "the fountain of justice" and contrary to ordinary prosecution ethics. He was informed in plain language that the Australian Government Solicitor's Office was in the process of being "privatised' and this meant that its clients would be free to choose their own solicitor. Unless the client was given everything that it wanted, they would go elsewhere and jobs would be lost. In these circumstances, the previous policy of guarding against injustice had ceased to apply. .

When the matter went back to Hosking DCJ, his Honour allowed Customs to re-open their defective case to try to repair it with amended averments. However, the amendments able to be made were ineffective and the essential part, being an averment of law, was eventually abandoned by the Prosecution.

Hosking DCJ then refused to hear submissions from counsel for the Defendants as to why the decision of the Court of Criminal Appeal required him to dismiss the charges and also refused to allow the Defence to re-open its case to lead the evidence that it had always wanted to lead and had been wrongly prevented as the Appeal Court had found. The provisions of the Justices Act (NSW) preclude an **appeal** in such circumstances but counsel for the Defendants advised that there was a procedure for **review** provided that all other possible forms of appeal had first been exhausted.

The Defendants then sought an order in the nature of certiorari against Hosking DCJ on the basis of a lack of procedural fairness. In preparing its case guided by counsel, English authority was adopted which resulted in a voluminous affidavit and several more succinct ones being filed. This did not find favour with the Court of Appeal which proceeded to strike out all of the Defendants affidavits and proceeded to summary judgement against the defendants without reading the relevant evidence. Any comments made by this Court as to guilt or liability to duty were, therefore, purely gratuitous, per incuriam and of no consequence.

Pearson then appealed to the High Court being conscious of the difficulty in obtaining Special Leave but needing to exhaust all avenues of appeal before seeking review by the Supreme Court. Because of the need for a succinct submission to the High Court, only a very narrow but seemingly compelling issue was raised. Prior to the application being heard, Toohey J. explained to all present in Court that the High Court only had the capacity to hear about 100 cases per year and must therefore only give leave in exceptional cases. In hearing the application, Gaudron J. clearly identified the injustice done to Pearson but, by a majority of 2 to 1, special leave was refused.

Because of the horrendous costs being incurred by each side, the solicitor for Pearson has been trying to negotiate an informal means of settlement; one suggestion was that the matter should be remitted by consent to the District Court to be dealt with according to law (after Hosking DCJ had been given the benefit of submissions on the effects of the decision of the Court of Criminal Appeal). However, Customs, which has an inexhaustible source of funds remained recalcitrant and seemed bent on grinding Pearson into submission by sheer weight of superior money resources

Having complied with the requirement to exhaust all apparently available forms of appeal, Pearson has applied to The Supreme Court of N.S.W. for review of the convictions pursuant to Section 474D of the Crimes Act, 1900 (N.S.W.). The matter is in the hands of Wood C.J. at C.L. who obviously considers this an appropriate matter to be referred to the Court of Criminal Appeal to be dealt with as an appeal. However, Customs have objected on the highly technical grounds that, in deciding that this is an appropriate case for review, Wood C.J. at C.L. is acting ministerially (seemingly in much the same way as a Magistrate who commits a person for trial for a federal offence) and this is constitutionally unsound under the separation of powers doctrine. Highly technical submissions have been made over two days of hearing and Customs have persuaded the Attorney-General for New South Wales to assist them despite an earlier decline by the State. Written submissions have followed the hearing days and considerable cost to all parties are being incurred.

Prior to the incurring of significant legal costs by all parties, another approach was made to Customs seeking a neutral approach to the constitutional question. This would leave Pearson with a burden of convincing the Court of its jurisdiction with opposition. In support of this approach, an opinion was obtained from Mr. R. Parker Q.C. stating that Pearson was innocent and that a miscarriage of justice had apparently occurred. As new counsel in this matter said, "this is not a big ask" since Pearson would still carry the onus of proof of jurisdiction and then the onus of prosecutiing the resultant appeal which would simply be the "hearing on the merits" which Customs tactics had so far denied the Defendants. It was suggested that this was an honourable and expeditious means of bringing to an end a matter that had been in issue for ten years and was likely to continue until Pearson received the hearing on the merits that he was entitled to. Customs, acting on the advice of in the Australian Government Solicitor's Office, declined even this small concession and further legal costs were incurred.

Subsequently, it has emerged that, by his own admission, was not familiar with the facts, had no understanding of the specialist legal principles associated with Customs Tariff cases, took note of a decision which had no authoritative bearing on guilt or innocence and completely ignored the authoritative decision of the Court of Criminal Appeal. Despite these handicaps, he was able to advise Customs that an eminent Queen's Counsel was wrong and Customs accepted his advice.

The issue raised by Customs might be thought to be of some merit by a Constitutional academic but its technicalities have been recognised by the Commonwealth Director of Public Prosecutions who, on several occasions, has declined to take the point.

Summary

(1) Pearson has consistently been denied a "hearing on the merits" which is his right in any of the courts that have dealt with the matter. Customs are currently trying to prevent a hearing on the merits in the Supreme Court by raising a technical objection. The forthcoming action for return of seized goods presents another opportunity for a hearing on the merits but the solicitor acting for Customs has again writen to say that

technical objections to this will again be taken; he has both threatened and cajoled the Defendants to forego this avenue of review. Such a sustained and determination to avoid a hearing on the merits can only be interpreted as a consciousness that the Customs case is flawed and Pearson is innocent. This amounts to an attempt to pervert the course of Justice:

(2) Taken on the merits and correctly applying the decision of the Court of Criminal Appeal, the Prosecution must fail because:

(a) it deliberately led no evidence that the goods were not correctly entered - the failed prosecution of Tavemar confirms that no such evidence exists;

(b) there is an abundance of expert evidence available to prove conclusively that the machines were correctly entered and no offences were committed but Customs have so far managed to prevent this evidence from being led - Gaudron J. at least, recognised the denial of natural justice;

(3) Even if the Customs Agent's advice to Pearson was wrong, there should have been no prosecution because:

(a) Customs were unable to interpret their own document and at times reached the same conclusion as the Agent;

(b) The GATT Agreement (to which Australia is a signatory) provides that no penalties should apply in such cases;

(c) The "Prosecution Policy of the Commonwealth" says no prosecution should occur;

(d) The Federal Court has held that no administrative penalties should be imposed in such cases;

(e) Prosecutions in other States did not proceed and seized goods were returned;

(f) The prosecution of Tavemar Pty. Ltd. which, unlike Pearson, was conducted "on the merits" and without the artificiality of the now discredited "decision in rem having preclusive effect" submission resulted in dismissal of all charges.

(4) There are strong indications that the prosecutions were initiated and maintained for improper reasons including mala fides;

(5) The technical objections now being raised to try to prevent review by the Supreme Court of New South Wales are:

(a) Contrary to observations made by the Commonwealth Ombudsman in his Annual Report for 1989/1990 (at Page 41);

(b) Evidence of determined desperation not to have the matter reviewed at any price. This includes a consciousness of past improper actions and a wrong result;

(c) An example of Customs using the superior financial resources of the Commonwealth to "grind" Pearson into submission.

The above lends weight to the conclusion drawn from what was said by Senior Customs Officers. This was a malicious prosecution to punish Pearson for once again defeating the Customs' attempt to overturn previous rulings on commercial/domestic. It is entirely consistent with a recent newspaper report that the reform of Customs following the Midford Paramount enquiry by the Senate had failed.(copy attached),

averment which took three hours to read. Indeed, Evatt J considered that it was "one of the most amazing documents in the whole history of law". Therefore, the real purpose behind the statement of Gavan Duffy CJ and Starke J appears to have been to highlight the importance of precision in averments. What is required, is that an averment alleges the facts necessary to establishing the offence and no more. However, the legal interpretation these facts must clearly be left to the court. The averments should completely and concisely set out the relevant evidence. They should go as far as the possibly can. However, they cannot intrude upon the proper realm of the court. That is, any legal considerations must be left to the court. If the averment had been set out as was suggested during argument before this Court, it would not infringe upon the principle laid down by Gavan Duffy CJ and Starke J. But as it was formulated, it did.

Amendment of the averment

Therefore, Averment 6, in its present form, is inadmissible in evidence. The next issue, therefore, is whether the respondent is able to amend the averment. Section 251 of the Act is in the following terms:

> *"251. No objection shall be taken or allowed to any information, summons or other originating process for any alleged defect therein in substance or in form or for any variance between such information, summons or other originating process and the evidence adduced at the hearing in support thereof, and the Court shall at all times make any amendment necessary to determine the real question in dispute or which may appear desirable, and if any such defect or variance shall appear to the Court to be such that the defendant has been thereby deceived or misled it shall be lawful for the Court upon such terms as it may think just to adjourn the hearing of the case to some future day." (emphasis added)*

The effect of this section, in the context of amendment of averments, was considered in *Schenker & Co (Aust) Pty Ltd v Sheen (Collector of Customs)* (1983) 48 ALR 693 (SCNSW), 699. That case involved an appeal by way of stated case from a magistrate. The magistrate had allowed the prosecution to make amendments to certain averments, relying on s 251 of the Act. Enderby J held that the combined effect of ss 251 and 255 of the Act meant that Customs prosecutions should be considered to be in a different category to ordinary prosecutions. Thus, the strict limitations placed on the re-opening of the Crown case by cases such as *Shaw v The Queen* (1952) 85 CLR 365, *Killick v R* (1981) 37 ALR 407 and *Lawrence v R* (1981) 38 ALR 1, should not be exercised in Customs prosecutions, where "averments play such an essential part and where the relevant facts are likely to be known only to the defence". See *Schenker*, at 700. Enderby J concluded that s 251 of the Act authorised the magistrate to allow the amendments, and consequently authorised the admission of fresh evidence on the re-opening of the prosecution case.

I agree with Enderby J that Customs prosecutions are, in this respect, in a category different from ordinary prosecutions. They are so placed by the express terms of the Act. As we have seen in the present case, the prosecution will often rely almost exclusively on averments in a Customs case, especially as regards matters solely within the knowledge of the accused. While the law should not sanction careless errors by the prosecution in formulating averments, in certain circumstances flexibility will be justified. It is condoned in express terms by the Act of the Federal Parliament. The most important of such circumstances is the provision of some justification or reasonable excuse on the part of the prosecution for any error in the averments.

It is not the place of this Court to decide whether an amendment of the averments is justified in this case. That is properly a matter for the decision of Hosking DCJ when the proceedings are returned to the District Court for reconsideration in the light of this Court's answers to the stated questions. However, as I have shown, if the averment was amended so as to reflect the form suggested during

(NOTE:
A PROPOSED AMENDMENT ON RETURN TO THE DISTRICT COURT FAILED
– SEE ATTACHMENT "C"

averment, and if they are so included, of course they have no practical effect.

Mr Paul Roberts, of counsel, who appears for the respondent, Controller General of Customs, has sought to amend Averments 6(a) and 6(b), and for convenience I shall set out the amended 6(a). Perhaps I should more accurately put it the - what is sought to become the amended 6(a).

> "The subject washing machines have an inner cylinder, to wit a spin drying basket, which cylinder has a volumetric cylinder capacity of less than 100 litres."

6(b) sought to be amended to read as follows:

> "The subject washing machines have a volumetric cylinder capacity of less than 100 litres, which figure when divided by 10 for the purposes of calculating the dry linen capacity pursuant to Tariff Concession 853005, gives a figure of less than 10."

Mr Healey of counsel, appears for the appellants, has indicated that leave to so amend the averments, to which I have just made reference, is opposed. Yes, Mr Healey?

HEALEY: Thank you, your Honour. Your Honour, the basis upon which the opposition has taken to the amendment of the averment is basically this, in respect of the first subparagraph under A, there is no objection to that. I clearly say that. I clearly say that 6(a), there is no objection, but--

HIS HONOUR: I'll just have that noted there, so--

HEALEY: Thank you, your Honour - 6(a), you could write on that, no objections taken in respect of that.

HIS HONOUR: And accordingly, leave to amend 6(a) is granted by consent.

HEALEY: If your Honour pleases.

HIS HONOUR: That now leaves 6(b).

MR HEALEY ~~HIS HONOUR~~: Your Honour, the objection to the amendment of that subparagraph is this, that it still offends and contains a mixed question of law and fact, and secondly, that it's an averment which the Prosecution knows, or ought to know is wrong and it should not be allowed. Thirdly, it still involves an averment of law, and--

HIS HONOUR: I'll just interrupt you there. Mr Roberts, the first part of - the first three lines - as a matter of fact, but isn't which figure when divided by 10 for the purposes of calculating the dry linen capacity, is that not a question of law?

ROBERTS: What, dividing 100 by 10? I don't think so, your Honour, but I mean, again I hesitate to put any sort of

dogmatic view after - because we argued strongly before that the dry linen capacity is a matter of fact were held to be wrong, but dividing 100 by 10, all it says, "We've divided it for the purposes of the TCO, but 100 divided by 10 gives a figure of less than 10. I don't know how it's said that that's a matter of law. But whether it's necessary or not is another thing.

HIS HONOUR: Well, that's the point I've come to. You see, I would have thought that the practical course, we're here to apply the law, we're not here to be pragmatic and practical, otherwise that just becomes palmtree justice, but I would have thought the more sensible course, this having survived the most careful scrutiny at the top of the judicial tree in this State, that I would have thought rather than running the risk of re-opening matters which have not attracted any adverse attention, and obviously if the point had substance, well it would have been agitated in the Court of Criminal Appeal, my tentative view is that I should refuse you leave to make the amendment as sought.

ROBERTS: The second one there--

HIS HONOUR: Mm.

ROBERTS: Well, if that's your Honour's view, that's your Honour's view. Your Honour--

HIS HONOUR: I don't want to run the risk, Judges have an obligation to see that - because you appear for a great Department of State, doesn't mean that your client is any less worthy of observing of justice than Mr Pearson and his company come here on level terms. But if it's not necessary, why run the risk of it going back to the Court of Criminal Appeal, or the Court of Appeal when it's just simply not necessary.

ROBERTS: Well, a couple of things, your Honour. I agree entirely with what your Honour says. It won't get back to the Court of Criminal Appeal, on that basis it couldn't, because your Honour couldn't refer it, however - because it's already been there. However, your Honour, if (a) is sufficient for the purposes, and does what we anticipate it does do, then there's no problem. Therefore it is unnecessary. If in due course your Honour finds that (a) doesn't factually do what we think it does, then no doubt not only are we entitled, but your Honour will be obliged to make sure that the averment does do what we think it does, so we're not precluded in that respect.

HIS HONOUR: But Mr Roberts, I've been - I might have made a great error in this case. One is not infallible, but the matter has received the most detailed consideration. Every point has been taken, and I'm sure Mr Healey would make no apology for that at all, but it just seems to me that it's pointless to go on with this. I have said, for better or worse in my reason, I find the offence in each case proved.

ROBERTS: Yes.

HIS HONOUR: No, I didn't. No, Mr Roberts--

ROBERTS: I didn't press--

HEALEY: You didn't press it?

HIS HONOUR: Mr Roberts put up a white flag.

HEALEY: Thank you, your Honour, but it requires some consideration in respect of--

HIS HONOUR: But you've won.

HEALEY: Pardon?

HEALEY: You've won on that point. Mr Roberts has, for reasons which he might have received some judicial encouragement for--

HEALEY: Yeah, well he did. He certainly did, your Honour, but what I'm concerned about is the effect--

HIS HONOUR: Mr Roberts is the shrinking violet at the Bar Table, I can tell you that.

HEALEY: Yes, I understand that, your Honour, by repute. But your Honour, what I'm saying to you is that there is some concern as to the manner in which we attack the problem hereafter.

HIS HONOUR: Well Mr Healey, I'm sorry, I don't understand. In relation to 6(a), that averment has been amended by consent, so it didn't require any judicial intervention. 6(b), I'm far from convinced that your point lacked substance. In other words--

HEALEY: I agree with your Honour, yes. I'm not trying to re-argue that. It's the effect--

HIS HONOUR: Then it's removed then from my determination because Mr Roberts said, and I make no bones about it, I thought that that would be a more pragmatic course, and also consistent with the interests of justice, really Mr Roberts, is it necessary for us to go into this detail? Now, whether he did it reluctantly or not, I don't know, never know, and with great respect I don't care. In any event, he said, "All right, I'm not going to. But if down the track some problems arise, well I know what my rights are, and if it becomes necessary, well I'll consider my position then."

So at this stage, there's been no judicial adjudication in relation to these amended averments. None at all. And one you consented, and the other, your objection prevailed because Mr Roberts didn't press it.

HEALEY: Thank you, your Honour. That's the point that we really want to analyse if we can, just for a few moments--

HIS HONOUR: Why?