

Introduction

Background to the Inquiry

- 1.1 Generally, averment provisions allow statements of fact made by the prosecution to be taken as *prima facie* evidence of the matters stated (or averred). There has been significant debate over averment provisions, both in relation to Customs and Excise matters and criminal proceedings in general. Averments in Customs proceedings are considered to be useful in situations where evidence is located overseas and may be very difficult to obtain and expensive to prove.¹ Averments can also be useful in establishing formal or non-controversial matters, or where matters are solely within the knowledge of the defendant.²
- 1.2 It has been argued, however, that there is considerable potential for overuse and abuse of averment provisions, and that averments go against fundamental principles requiring the Crown to prove every element of its case to the appropriate standard. It has also been argued that, depending on the case, averments may impose an unreasonable burden on the defendant, who may face difficulties and expense in obtaining evidence similar to those facing prosecutors.³

1 Australian Law Reform Commission (ALRC), *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.151.

2 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.151.

3 Customs and International Transactions Committee, Business Law Section, Law Council of Australia (CITC), *Submission 3*, pp.12-13.

- 1.3 A related issue is the nature of Customs prosecutions. There has been considerable uncertainty as to whether Customs prosecutions in the higher courts are civil or criminal in nature. This is significant, as the nature of the prosecution will determine the standard of proof required to establish the prosecutor's case – the civil standard (proof on the balance of probabilities), or the more onerous criminal standard (proof beyond reasonable doubt). A number of submissions to the Committee referred to a pending High Court case, *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors*, as potentially providing guidance on this issue.⁴ As the High Court has recently handed down its decision in this case, the Committee believes that it is appropriate to note the issue in this report.

Effect of Averment Provisions

- 1.4 As noted at paragraph 1.1 above, averment provisions provide that statements of fact made by the prosecution are considered to be *prima facie* evidence of the matters averred. Such statements are taken to be established unless the defendant produces evidence to the contrary. This does not, however, place upon the defendant the legal burden of disproving the matters averred.⁵ The defendant will not have to disprove the matters averred to the relevant standard – for example, in the case of the criminal standard applying, beyond reasonable doubt. Further, it is well established by judicial authority that, in criminal prosecutions, averment provisions do not reverse the persuasive burden that lies upon the prosecution. That is, while an averment may constitute *prima facie* evidence of the fact averred, the onus of proving, beyond a reasonable doubt, that an offence has been committed still rests with the prosecution.⁶ The court must still decide whether or not the prosecution has established guilt.⁷

Averment Provisions in the *Customs Act 1901*

- 1.5 The main averment provision in the *Customs Act 1901* is section 255. Section 255 is as follows:
-

4 CITC, *Submission 3*, p.5; Australian Customs Service (ACS), *Submission 4*, p.9; Commonwealth Attorney-General's Department (AGD), *Submission 5*, p.4.

5 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507; *Charlton v Rogers; Ex parte Charlton* (1985) 20 A Crim R 240; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* [2003] HCA 49 at [142].

6 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507-508; *Charlton v Rogers; Ex parte Charlton* (1985) 20 A Crim R 240.

7 *May v O'Sullivan* (1955) 92 CLR 654; *Ex parte Healy* [1903] 3 SR (NSW) 14.

- (1) In any Customs 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.
- (2) This section shall apply to any matters so averred although:
 - (a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or
 - (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be *prima facie* evidence of the fact only.
- (3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section.
- (4) The foregoing provisions of this section shall not apply to:
 - (a) an averment of the intent of the defendant; or
 - (b) proceedings for an indictable offence or an offence directly punishable by imprisonment.
- (5) This section shall not lessen or affect any onus of proof otherwise falling on the defendant.

1.6 Under section 35A of the Act, averments can also be made by the Collector in proceedings for the recovery of debt relating to the safekeeping of goods on which a Customs duty is payable.⁸ The Australian Customs Service (ACS) indicated that common law principles will apply to the use of averments in such proceedings.⁹

1.7 The ACS noted the basic rationale for these averment provisions:

The principal legislative policy reason for the use of averments in Customs prosecutions is that they assist the enforcement of the objects of the Act, the most important of which is protection of the revenue.¹⁰

8 Under section 8 of the Act, a reference to a Collector is defined as being a reference to the Chief Executive Officer of Customs, the Regional Director for a State or Territory, or any officer doing duty in the matter in relation to which the expression is used.

9 ACS, *Submission 4.3*, p.1.

10 ACS, *Submission 4*, p.5.

Averment Provisions Elsewhere

- 1.8 In addition to the *Customs Act 1901*, a number of other Commonwealth Acts contain averment provisions. Examples include:
- the *Excise Act 1901*;
 - the *Crimes Act 1914*;
 - the *Taxation Administration Act 1953*;
 - the *Commonwealth Electoral Act 1918*;
 - the *Marriage Act 1961*; and
 - the *Income Tax Assessment Act 1936*.¹¹
- 1.9 The *Quarantine Act 1908* contained an averment provision (section 86D) until 1999 when, under the *Quarantine Amendment Act 1999*, it was repealed and replaced by a provision setting out an alternative process for establishing *prima facie* evidence of certain matters.¹² The Explanatory Memorandum for the Quarantine Amendment Bill 1998 indicates the necessity of replacing section 86D with an alternative process: ‘The [new] section is designed to overcome some of the evidential problems that might arise due to the loss of the averment provision in section 86D of the Act.’¹³
- 1.10 Averment provisions, or provisions providing in some way for the establishment of *prima facie* evidence by the prosecution, can also be found in the Customs legislation of other countries. Examples include section 154 of the *Customs and Excise Management Act (1979)* (UK),¹⁴ section 1615 of the United States Customs Legislation,¹⁵ and section 239 of the New Zealand *Customs and Excise Act 1996*.¹⁶

11 AGD, *Submission 5*, Attachment A. For further examples of Commonwealth Acts containing averment provisions, see the Senate Standing Committee on Constitutional and Legal Affairs (SSCCALA), *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, Appendix C.

12 Section 86D of the *Quarantine Act 1908* was repealed by the *Quarantine Amendment Act 1999* and replaced by section 86DA.

13 Explanatory Memorandum to the Quarantine Amendment Bill 1998, p.56.

14 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.151.

15 CITC, *Submission 3*, p.3 and Annexure A. Title 19 of the United States Code contains provisions relating to Customs duties (including section 1615) and can be found at: <http://www.access.gpo.gov/uscode/title19/title19.html>.

16 ACS, *Submission 4*, pp.18-19.

Historical Context

- 1.11 The origin of averment provisions in Commonwealth legislation can be traced to English Customs and Revenue Acts of the nineteenth century.¹⁷ In 1926, Justice Isaacs of the High Court outlined the reasons for the inclusion of averment provisions in the *Immigration Act 1907*:

In most cases, and in late years invariably, special evidentiary provisions have been included without which the main substantive provisions would be of little use. These evidentiary provisions have been found necessary to prevent or counteract the surreptitious or fraudulent evasion of the actual immigration laws by persons who in truth are smuggled into the country and are only discovered, if ever, with difficulty.¹⁸

- 1.12 The ACS cited a passage from an early treatise on Australian Customs law to illustrate the historical rationale behind section 255 of the *Customs Act 1901*:

This is a most important provision, and though not by any means novel in Customs Acts, has been much commented upon as if it were something altogether new and unprecedented. It is a very necessary provision, inasmuch as in many 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.¹⁹

- 1.13 The Commonwealth Attorney-General's Department (AGD) outlined the provenance of sections 255 and 35A:

A provision similar to section 255... was included in the original version of the legislation (as section 240), section 35A was introduced in 1953.²⁰

- 1.14 The ACS noted that 'Since enactment, section 255 has been amended only once. This provision has remained unchanged since 1923.'²¹

17 SSCALA, *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, p.65. The AGD notes similarly: AGD, *Submission 5*, p.1.

18 *Williamson v Ah On* (1926) 39 CLR 95 at 103.

19 H.N.P. Wollaston, *Customs Law and Regulations* (Sydney: William Brooks and Co., 1904), p.169. Cited in ACS, *Submission 4*, p.4.

20 AGD, *Submission 5*, p.1.

21 ACS, *Submission 4*, p.4.

Limitations on the Use of Averment Provisions

- 1.15 The High Court has indicated that matters in averments ‘should be stated fully and with precision’,²² and courts have been cautious in their treatment of averments, perceiving the ‘possibility of injustice arising from their use’.²³ The courts have identified a number of limitations on the use of averments. Averments do not make evidence admissible which is otherwise inadmissible,²⁴ and may not be made stating opinion,²⁵ irrelevant facts,²⁶ or ‘evidence supporting the allegation of the offence’.²⁷
- 1.16 The use of section 255 of the *Customs Act 1901* is also subject to specific statutory limitations:
- under subsection 255(1), the ability to make averments under section 255 is limited to Customs prosecutions under the Act;²⁸
 - under subsection 255(2), an averment made under section 255 concerning a mixed question of law and fact will establish *prima facie* evidence of the fact only;
 - under subsection 255(4), averments made under section 255 cannot be used in relation to ‘proceedings for an indictable offence or an offence directly punishable by imprisonment’²⁹ or to establish *prima facie* evidence of the intent of the defendant.
- 1.17 Other Commonwealth Acts containing averment provisions may also specify limitations on their use.
- 1.18 Section 255 also provides that any evidence given by witnesses in support or rebuttal of a matter averred under the section ‘shall be considered on its merits’, and that the credibility and value of the

22 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 501; *Charlton v Rogers; Ex parte Charlton* (1985) 20 A Crim R 243.

23 *Gallagher v Cendak* (1988) VR 739.

24 *R v McStay* (1945) 7 ATD 527 (HC); ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.150.

25 *Australasian Jam Company Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23.

26 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 501.

27 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 501.

28 Section 244 of the Act defines a Customs prosecution as proceedings by Customs for the recovery of penalties under the Act (excepting certain pecuniary penalties relating to narcotics dealing and diesel fuel rebate contraventions), or proceedings by Customs for the condemnation of ships, aircraft or goods seized as forfeited.

29 Section 4G of the *Crimes Act 1914* defines indictable offences as offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears.

evidence will not be increased or diminished by reason of the section (subsection 255(3)).

Previous Reviews Dealing with Averment Provisions

1.19 The Committee notes that averment provisions, including section 255 of the *Customs Act 1901*, have received considerable attention in the course of previous inquiries and reviews. Some of the main conclusions and recommendations that have emerged in relation to averment provisions are summarised below.

Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings (1982)*

1.20 Over the course of 1980-82 the Senate Standing Committee on Constitutional and Legal Affairs conducted an inquiry into statutory provisions imposing a burden of proof upon defendants. In its 1982 report, the Committee recognised that there was a 'legitimate need for [averment] provisions, especially in circumstances where the prosecutor faces an insurmountable difficulty of proof'.³⁰ The Committee also stated that:

The comparatively substantial increase in the number of averment provisions in recent years coupled with the potential for abuse by prosecutors has lead [*sic*] us to the conclusion that there should be restrictions on their use.³¹

1.21 Accordingly, the Committee made the following recommendations:

- (a) As a matter of legislative policy averment provisions should be kept to a minimum.
- (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 only and does not in itself relate to any conduct on the part of the defendant; or
 - (ii) where the matter in question relates to conduct of the defendant alleged to constitute an ingredient

30 SSCCALA, *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, p.71. The Committee noted section 255 of the *Customs Act 1901*.

31 SSCCALA, *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, p.71.

in the offence charged and is peculiarly within the defendant's knowledge.

- (c) When seeking to rely upon averment provisions, prosecutors should have regard to the following criteria:
- (i) averments should be so stated that they are sufficient in law to constitute the charge;
 - (ii) the facts and circumstances constituting the offence should be stated fully and with precision;
 - (iii) the Crown should not aver matters of law or matters of mixed fact and law;
 - (iv) averments should not amend or alter the rules of pleading or those regulating the statement of the offence;
 - (v) averments should be restricted to the ingredients of the charge and informations should not contain evidentiary material.³²

1.22 In his response to the Committee's report, the Commonwealth Attorney-General stated 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 at this time to enact special legislation in this area.³³

Commonwealth Attorney-General's Department, *Review of Commonwealth Criminal Law (1991)*

1.23 In 1987 a Committee was established by the Commonwealth Attorney-General to review Commonwealth criminal law. The Committee included a consideration of averment provisions in its 1991 Final Report. The Committee noted the recommendations of the 1982 Senate Standing Committee, but did not support the enactment of specific legislation to limit the use of averments because 'Parliament could not by one Act bind future Parliaments' and

32 SSCCALA, *The Burden of Proof in Criminal Proceedings*, 1982, AGPS, Canberra, pp.73-74.

33 Quoted in AGD, *Review of Commonwealth Criminal Law Final Report*, December 1991, AGPS, Canberra, p.62.

‘...there [are] limits to what can be achieved by a law as to construction of future Acts’.³⁴

- 1.24 The Committee took it as a basic general requirement that averment provisions should not be used to prove the intent of a defendant or where an offence is directly punishable by imprisonment (the Committee recognised that section 255 of the *Customs Act 1901* satisfies this requirement).³⁵ This aside, the Committee considered averment provisions in revenue and non-revenue legislation separately. In the case of revenue legislation (such as the *Customs Act 1901*), the Committee, noting that the Australian Law Reform Commission (ALRC) was at the time engaged in a review of Customs and Excise legislation, refrained from considering the matter further:

...the question of what may be included in averments under revenue legislation... is best deferred until the A.L.R.C. has dealt with the subject of averments under Customs and Excise legislation in connection with its review of that legislation.³⁶

Australian Law Reform Commission, *Report No 60: Customs and Excise (1992)*

- 1.25 Over the course of 1987-1992 the ALRC conducted a review of the *Customs Act 1901* and the *Excise Act 1901*. In its 1992 report (ALRC 60) the ALRC concluded that:

...there is a need for averments in customs prosecutions in certain circumstances, principally where the evidence is located overseas, where the averment deals with formal or non-controversial matters, and where matters are such that they could easily be disposed of by the defendant without unfairness.³⁷

- 1.26 The ALRC also concluded, however, that ‘averments are capable of abuse’.³⁸ The ALRC noted the recommendations of the 1982 Senate

34 AGD, *Review of Commonwealth Criminal Law Final Report*, December 1991, AGPS, Canberra, p.62.

35 AGD, *Review of Commonwealth Criminal Law Final Report*, December 1991, AGPS, Canberra, pp.63-64.

36 AGD, *Review of Commonwealth Criminal Law Final Report*, December 1991, AGPS, Canberra, p.67.

37 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.150.

38 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.150.

Standing Committee but did not support the enactment of specific legislation along the lines recommended by the Committee:

The Commission does not consider that enactment of codified legislation setting out precisely what averments may or may not be allowed is a desirable approach. The result could be arbitrary and may not meet the needs of a particular case.³⁹

- 1.27 The ALRC also observed that, in the context of a Customs prosecution, 'leaving the matter [of averments] to the trial could prejudice the accused and if averments are disallowed could lead to delay and cost'.⁴⁰ The ALRC expressed a preference for the resolution of averments issues prior to the commencement of the trial phase:

...averments should be subject to judicial control at the pre-trial stage of the prosecution so that the need for them can be ascertained and no unfairness to the defendant will result. ...The preferred approach is to allow the court to consider the question at a directions hearing.⁴¹

- 1.28 The major proposal emerging from the review was a draft Customs and Excise Bill designed to replace the two current Acts dealing with these matters. The ALRC included an averment provision in the draft Bill (clause 487) which largely reproduced section 255 of the *Customs Act 1901*, but which also contained a new component giving courts the discretion to disallow averments on the basis of injustice to the defendant:

- (5) If it would be unjust to allow the prosecutor to rely on an averment, the court may, by order, on a directions hearing, disallow the averment.
- (6) Without limiting the matters that the court is to take into account for the purposes of subsection (5), the court is to take into account the following:
 - (a) whether the averment is of a matter that is merely formal or is not substantially in dispute;
 - (b) whether the prosecutor is in a position to adduce evidence of the matter and if the prosecutor is not in such a position, whether because the evidence is overseas or for some other reason, obtaining the evidence would result in undue cost or delay;

39 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.155.

40 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.155.

41 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II pp.150, 155.

- (c) whether the defendant is reasonably able to obtain information or evidence about the matter;
- (d) what admissions, if any, the defendant has made in relation to the matter.

(7) The prosecutor cannot rely on a disallowed averment.⁴²

1.29 The ALRC noted that, under the provision:

The whole question of allowing or disallowing averments involves a task of balancing a number of considerations. The factors which the court can take into account indicate that clearly enough. It is injustice to the defendant and not some minor disadvantage which will lead to the averments being disallowed.⁴³

Australian Law Reform Commission, *Report No 95: Principled Regulation: Federal Civil & Administrative Penalties in Australia* (2002)

1.30 The ALRC considered Customs prosecutions as part of its 2000-2002 inquiry into Commonwealth laws relating to the imposition of civil and administrative penalties. In its 2002 report (ALRC 95), the ALRC noted the views expressed in ALRC 60 regarding averment provisions and endorsed the expansion of section 255 recommended therein:

As recommended in the ALRC's report, *Customs and Excise* (ALRC 60, 1992), averments may be disallowed in any proceedings by the court if it is of the view that they would be unfair to the accused.⁴⁴

1.31 In terms of the ALRC's broader consideration of Customs prosecutions in the inquiry, a key recommendation was the removal of the concept of a Customs or Excise prosecution from the legislation and the clear reclassification of relevant offences as either criminal or civil in nature.⁴⁵ Within this context, the ALRC also recommended that the legislation be amended to 'specify in relation to each criminal offence whether averments are to be permitted.'⁴⁶ The ALRC noted

42 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. I pp.278-279.

43 ALRC, *Customs and Excise*, ALRC 60 (1992), ALRC, Sydney, Vol. II p.156.

44 ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.485 (Recommendation 13-2).

45 ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.485 (Recommendation 13-1).

46 ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.485 (Recommendation 13-1).

however, that, within this context, 'it should be left to Parliament to debate the merits of the averment process'.⁴⁷

- 1.32 A number of submissions to the Committee discussed both ALRC 60 and ALRC 95.

The Committee's Inquiry and Report

Referral of the Inquiry

- 1.33 On 27 March 2003 the House of Representatives Standing Committee on Legal and Constitutional Affairs resolved to conduct an inquiry into averment provisions in Australian Customs legislation. The inquiry followed the Committee's review of the Australian Customs Service *Annual Report 2001-02*.

Conduct of the Inquiry

- 1.34 An advertisement inviting submissions to the inquiry appeared in *The Australian* newspaper on 2 April 2003. Letters seeking submissions were also sent to a range of organisations likely to have an interest in the subject of the inquiry.
- 1.35 The Committee received 7 submissions, 20 supplementary submissions, and 6 exhibits.⁴⁸
- 1.36 Public hearings were held in Canberra on 23 June 2003 and Sydney on 24 July 2003.⁴⁹
- 1.37 Evidence relating principally to individual cases involving the use of the averment provisions in the *Customs Act 1901* was provided to the Committee in respect of two matters: *Comptroller-General of Customs v Tomson and Keomalavong* and *Noel Pearson and Co Pty Ltd & Another v Comptroller-General of Customs*.

47 ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002), ALRC, Sydney, p.484.

48 A list of submissions is at Appendix A; a list of exhibits is at Appendix B.

49 A list of witnesses who gave evidence at the public hearings is at Appendix C.

The Report

- 1.38 In this report the Committee concentrates on the key issues identified in the evidence. The structure of the report reflects these issues.
- 1.39 Chapter 2 considers the appropriateness of the averment provisions in the *Customs Act 1901*. The Committee focuses on some of the main issues relating to the question of appropriateness and considers arguments both in support of and against the averment provisions. The Committee also notes the implications of the recent High Court decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* regarding the nature of Customs prosecutions.
- 1.40 In Chapter 3 the Committee examines the use of the averment provisions in *Comptroller-General of Customs v Tomson and Keomalavong*.