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Submission 7.1

FACSIMILE COVER SHEET

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From: Reg Benson **To: The Hon. Bronyn Bishop MP**

To Fax No. 6277 4773 **No. of Pages: 29 (including this header)**

Date: 19th December, 2003

MESSAGE

Dear Mrs Bishop,

The following copies of documents are forwarded as you requested today. Although the Pearson matter appears quite simple on the surface, there are many undercurrents and complications which make it hard to be concise. I have selected those documents which seem to fit your request but the result is so many that I will send them in 2 instalments during the afternoon.

I think that I should provide you first with an overview and will number and list all of the documents hereunder seriatim:

BACKGROUND

1. A 2 page document headed "The Core of the Dispute - Pearson" and
2. a 9 page document headed "Customs v Pearson"
3. A 3 page document headed "Animus in Pearson"
4. A copy of the notorious " Letter" which was addressed to the Law Society of N.S.W. this was solicited by the Law Society which was investigating a spurious complaint against me.

THE PROSECUTION OF PEARSON AND THE USE OF AVERMENTS

5. A sample copy of the Informations charging Mr. Pearson and his Company with evading payment of duty on "Maytag" commercial washer extractors imported by the company and entered and duty paid by Ray Katte of Cridland Katte, Customs Agents. The informations included a number of averments and Averment No. 6 is of particular interest as will emerge:
6. An extract from the opening address by the Prosecutor for Customs in the District Court before Hosking DCJ in which he (Roberts) states that he will not under any circumstances be leading evidence from expert

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THE CORE OF THE DISPUTE

PEARSON

- The dispute is as to the correct rate of duty which Pearson asserts is 2%.
- The rate of 2% may apply for several reasons but Pearson's Customs Agent (Ray Katte) chose T.C.O. 8530085
- T.C.O. 8530085 required a capacity more than 10 kgs per batch and this was to be calculated from a deeming formula expressed in the T.C.O. (described as a "Note")
- The formula required that the capacity of the "cylinder" be measured.
- Maytag machines have an outer cylinder which holds the washing water and an inner perforated "basket" which is used only in the "spin-drying" process.
- The capacity of the outer cylinder is large enough to comply with TC8530085 but the "basket" is too small.
- Ray Katte had no doubt that the relevant cylinder was the outer cylinder and all members of the laundry machine trade agree with him.
- In the A.A.T., the Tribunal decided as a question of fact, on its own initiative and without evidence, that the inner cylinder was the relevant cylinder. It also made errors of law which were appealed to the Federal Court and corrected there.
- The Federal Court had no jurisdiction to consider findings of fact from the Tribunal but was able to rule, as a question of law, that the relevant cylinder is the one which controls the capacity of the machine **to wash**.
- The Full Federal Court also expressed the opinion that the machines were "washer extractors". This would lead inevitably to classification under then Item 84.40.9 with duty at the rate of 2% but the proceedings in that Court were limited to whether or not Items 84.40.1 or 84.40.2 applied (ie. whether they were domestic or commercial types). It was conclusively shown that they were commercial but the terms of reference before the Federal Court precluded a ruling on Item 84.40.9 in that Court.
- In subsequent prosecution proceedings, Pearson had available expert witnesses who could prove that the outer cylinder complied with the Federal Court's ruling but the Prosecution raised the argument that this evidence was "precluded" by the Federal Court and A.A.T. decisions and could not be led in the prosecutions.
- The Prosecution argument was accepted until a "Stated Case" to the Court of Criminal Appeal emphatically rejected it. The appeal Court also remarked on the "dearth of evidence" led by the Prosecution. It could not direct the District Court Judge to dismiss the charges because of the possibility that the Prosecution might be able to amend its averments (subsequently it was unable to do so) and because of the nature of a Stated Case. On the failure to amend being conceded, the District Court, as a matter of law was required to dismiss the charges but Hosking DCJ declined to follow the directions of the superior court.
- On return of the results of the "Stated Case" to the District Court, the judge adopted an extraordinary antagonism at the result and purported to selectively apply a very small part of the decision without accepting the strict restrictions placed on such application and ignoring alternative defences. He convicted

witnesses. This is a concession that the evidence of expert witnesses is the normal way of proving Customs Tariff Classification and, hence, the amount of duty payable. Mr. Roberts also issued the threat of "carting Hosking DCJ to the Court of Criminal Appeal unless he agreed with him (Roberts). There is also the deliberate misdiscription of the machines as washing machines despite the clearly expressed opinion of the Full Federal Court that they were washer extractors.

Mr. Roberts never resiled from his refusal to lead evidence throughout the many stages of proceedings.

7. Three pages of the transcript before Hosking DCJ on 2/2/96 (i.e. after return of the matter from the Court of Criminal Appeal which advised his Honour that there was no *issue estoppel, res judicata or decisions in rem* on which the prosecution could rely). In effect there was a *dearth of evidence"* which might only be remedied if a suitable averment of fact could be added by way of amendment. Page 5 of the transcript shows that the prosecution attempted to "expand" the **wording** of the former Averment 6 including separating it into 2 parts. Part (a) was of no effect there being agreement on that fact from the beginning ; the issue to be decided was which was the "cylinder" referred to in the Note to TC 8530085 and this called for legal interpretation before it could have any effect as found by the Court of Criminal Appeal.

Page 7 of the transcript shows that the proposed amendment in Part (b) was abandoned by the prosecution. If an averment of fact, this could have aided (but not conclusively) the prosecution. However, it was clearly an averment of law and was abandoned for this reason.

8. A document headed "Annexure 'H' " containing relevant extracts from Reasons of Kirby A/CJ in the Court of Criminal Appeal. His brethren agreed with him.

9. A commentary on Paragraph 60 of the reasons of Wood C.J. at C.L. who held that the prosecution would have failed absent an effective amendment of the averments. There was also a question of the right to lead rebuttal evidence as contemplated by Section 255 (3) of the *Customs Act, 1901* and usual practice and procedure.

More to follow

Reg Benson
Solicitor

Pearson noting that N.S.W. legislation prevented a direct appeal from his decision.

- N.S.W. legislation provides an alternative form of review but it is incumbent on the applicant to first exhaust all other forms of appeal. This was done by seeking an order for denial of natural justice and procedural fairness. No evidence going to the merits of the conviction were before the courts in this phase. Although some judges commented that they could see no error, they did not have the evidence before them to support this comment.
- In the absence of a review mechanism in Commonwealth legislation, Pearson would now seem to be eligible to have his convictions reviewed under N.S.W. procedures especially since Customs chose to invest the State Courts with federal jurisdiction. However, when Pearson applied for such a review Customs raised a highly technical objection based on the "separation of powers" doctrine contrary to what the Ombudsman said in his Annual Report of 1989/1990 at Page 41 and despite the fact that the Director of Public Prosecutions has never resorted to this device. The objection has been heard by Wood J. in the Supreme Court of N.S.W. but no decision has yet been handed down..
- If Wood J reaches a conclusion adverse to Pearson because he is bound by earlier general rulings of the High Court, the technical objection is capable of being appealed at great expense to each party as the High Court is quite capable of refining its earlier decisions to deal with this specific problem.
- The objection by Customs referred to in the previous paragraph is the last of a long series of manoeuvres adopted by Customs to prevent Pearson from obtaining the hearing on the merits to which he is entitled. This is the sixth such occasion and a seventh is in the "pipeline". This is the action commenced by Pearson for the return of seized goods and the solicitor for Customs is already trying to prevent a hearing on the merits once again. There is only one reason why such determined and constantly repeated steps would be taken contrary to normal prosecution ethics and that is consciousness that the convictions were wrongly obtained.
- Pearson has other remedies available but cost, stress and time strongly indicate that the matter should be resolved quickly and economically. Unfortunately, history shows that Customs are prepared to, and have in the past, used the unlimited financial resources of the Commonwealth to "grind" their opponents into submission through lack of funds.

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CUSTOMS v PEARSON

- From 1981, Delegates of the Comptroller-General of Customs (now the C.E.O.) began making Tariff Concession Orders for commercial washer extractors and other laundry equipment.

- From 1982, Customs Commercial Investigation Officers commenced a campaign to restrict the application of these Orders apparently at the behest of Email Ltd. who feared that, because of the deteriorating quality of their product, the smaller commercial machines would start to encroach on their market despite the large price differentials (about double the price of the domestic product).

- In 1982 and 1983 disputes raised by Customs were referred to the Administrative Appeals Tribunal but were decided against Customs. In one case, Customs argued that a coin operated machine was a domestic machine.

- In 1986, Customs purported to create a Tariff Concession Order for Commercial machines (TC 863141). However, this Order was found some years later to have been invalidly created because Customs had failed to properly Gazette it.

- In 1987, raids were carried out on all importers of "Maytag" and "Speed Queen" washer extractors in all States despite their failure with "Speed Queen" in 1983 and contrary to the apparently valid TC 863141 which had been notified as applicable. Machines were seized as forfeited. On various later dates prosecutions were commenced against all importers who had acted on the advice of their several Customs Agents (Brokers) and entered at the concessional rate of 2% duty; in many cases they chose to rely on another Concession Order (TC 8530085) but this, in no way, precluded them from also relying on TC 863141 as both appeared to apply. In Pearson's case, the decision to utilise TC 8530085 was based entirely on the advice of Ray Katte, the Customs Agent - see Mr. Katte's statement.

- Because Sub-Section 269C (1) of the *Customs Act, 1901* (as it then was) made the creation of Concession Order TC 863141 mandatory, Customs undertook to validated it but delays by Customs limited the effect of the Order. The "Harmonised Tariff" operated from 1st January, 1988 and Customs argued that the Order could not be validated so as to operate before this date. If the Order had been validly created as all believed on Customs' advice, then all of the importers who had been raided had this additional basis to

support the correctness of their entries provided the machines were "commercial" as was subsequently proved to be the case. It is clear that the primary purpose of Customs at this time was to have the machines identified as domestic so as to extend "Tariff Protection" (illegally) to the local domestic machines.

- On 25th November, 1988, Pearson challenged the Customs' ruling which was originally that the machines were "domestic types". As their grounds for this assertion became increasingly suspect, new additional grounds were added mainly directed to whether Australia Standard AS 2040 of 1977 over-rode the "deeming" note in TC 8530085 and whether "capacity" of the cylinder should be measured in alternative ways (e.g. by deducting the volume of the agitator, by limiting the capacity to the amount filled when the machine was switched on etc.). At one point, Customs raised the question whether the "basket" was the relevant cylinder but this was abandoned and no evidence or argument was directed to it.

- The identity of the relevant cylinder for the purposes of TC 8530085 was clearly the outer cylinder (which, in all cases exceeded the required 100 litres) because:

  (i) This is the cylinder which contains the washing water;

  (ii) The "basket" plays no part in the washing process being only activated for the extraction ("spin drying") cycle;

  (iii) Customs had conducted an overseas enquiry with the manufacturer of "Speed Queen" machines and had been told that the outer cylinder was clearly the relevant cylinder;

  (iv) The Customs file on which TC 8530085 had been created showed that the Delegate who created it intended that the outer cylinder would be the relevant cylinder;

  (v) A previous Customs' ruling in Brisbane confirmed the outer cylinder to be relevant for the purposes of "capacity".

  (vi) Pearson has (and always has had) expert trade witnesses (the traditional "informed observers"

prescribed by the Federal Court as appropriate to determine classification disputes). Each of these witnesses will unequivocally depose to:

(a) the outer cylinder being the relevant cylinder for the purposes of TC 8530085; and

(b) the goods are washer extractors and not merely washing machines. It follows from this factual identification that they are classifiable under Sub-item 84.40.9 in the Customs Tariff and are dutiable at the rate of 2%. No offences were therefore committed.

- The decision of the Administrative Appeals Tribunal was handed down on 1st August, 1989 but contained various errors which necessitated an appeal to the Federal Court on points of law there being no jurisdiction for appeals as to facts wrongly found.

- Although it was unnecessary to his decision, Deputy President Bannon in the Administrative Appeals Tribunal decided that the inner "basket" was the relevant cylinder for the purposes of TC 8530085. He appears to have done this after discussions with a salesman in a retail store selling domestic machines. Sub-section 33 (1) (c) of the Tribunal's Act allows for informal fact finding but the Court of Criminal Appeal has later ruled that such findings are not admissible in prosecutions even though they bound the Federal Court in civil proceedings.

- On appeal, the Federal Court found all issues of law in favour of Pearson (especially on the commercial issue) but was unable to make findings of fact. Wilcox J. held that the cylinder which controlled the machines' capacity to wash was the relevant cylinder and the Full Court stated that the machines were washer extractors and not washing machines.

- In New South Wales, criminal prosecution proceedings were commenced by Local Court informations against Pearson on 12th September, 1989 and against Tavemar Pty. Ltd. (the importer of "Speed Queen machines) on 24th June, 1991. The Informations exhibited against Pearson were later replaced by amended informations on 30th November, 1991. In other States, quasi-

criminal proceedings were commenced but, in each case, were later "settled" without convictions being recorded.

- The hearing of the charges against Pearson commenced in the Local Court in August, 1991 and continued into the next month. The Prosecution successfully argued over strenuous objections that the Administrative Appeals Tribunal decision as modified by the Federal Court constituted a decision in rem which precluded Pearson from leading evidence that he was innocent. An expert witness was called by Pearson to prove facts that would lead inevitably to the conclusion that the correct rate of duty had been paid and that Pearson's Customs Agent was correct. The Magistrate upheld (wrongly as later appears) that such evidence was precluded from being led. Inevitably, Pearson was convicted and heavy (minimum) penalties were imposed.

- Following convictions recorded in the Local Court, Mr. Ray Katte, Pearson's Customs Agent convened a meeting with Customs aimed at clarifying his part in the decision to enter Pearson's goods at the rate of 2%. Present for Customs were Mr. Greg Collins and Mr. Mick Drury and Mr. Katte gave a sincere and emotional submission that Mr. Pearson was innocent of any wrong doing and that the decision was his (Katte's). Mr. Collins adopted such a hard and inflexible approach that Mr. Katte, who had always been a staunch supporter of Customs was literally reduced to tears. Collins then specified terms under which he was prepared to modify the prosecutions. He required Pearson to pay a sum in excess of $70,000.00 notwithstanding that duty allegedly shortpaid was less than $30,000.00. Mr. Pearson, who was suffering a heart condition brought on by stress, appeared to be about to accept these terms but Collins went on to insist the Mr. Pearson personally as well as the company also plead guilty to some charges. These totally unreasonable terms were then rejected by Mr.Pearson who valued his unblemished record (Hosking DCJ later described him as "an honest man"). The reason for Mr. Collins' unreasonable attitude became apparent some time later when he indicated in front of witnesses that Mr. Pearson was being punished for thwarting the Customs' intention of imposing domestic rates of duty on small commercial machines.

- The prosecution of the Sydney importer of "Speed Queen" machines (Tavernar Pty. Ltd.) also commenced in the Local Court but, in this case, no attempt was made to prevent the Defendant leading exculpatory evidence and this was done. In the result, all charges which were similar to those against Pearson were

dismissed. A different disturbing feature in this prosecution was that a Customs Officer gave evidence and produced the outer cylinder from what he alleged was a "Speed Queen" machine. A witness from Email Ltd. then gave evidence that he had measured the outer cylinder and found it to have a capacity well short of 100 litres. During a recess, the cylinder was examined and found to be not from a "Speed Queen" machine. On being recalled, the Customs Officer then admitted that the cylinder came from a "Kleen Maid" machine which is the domestic model produced by Speed Queen. The corresponding cylinder from the "Speed Queen" machine was comfortably in excess of the critical 100 litres. Later, a complaint at this apparent perjury was made to senior Customs Officers who promised an enquiry through Internal Affairs but that enquiry has never been conducted despite follow-up requests.

- Pearson appealed to the District Court where the Prosecutor first stated that he had no intention of calling any evidence but would rely on the same argument about the "preclusive effect" of the Tribunal/Federal Court's decision. This submission was argued heatedly for nearly a week. Ultimately, Hosking DCJ also upheld the "preclusive effect" decision and conviction again appeared inevitable. In these circumstances, Pearson requested Hosking DCJ to state a case to the Court of Criminal Appeal seeking advice on several points but, in particular, the argument as to "preclusive effect".

- On 1st October, 1993 a detailed letter was sent to the Australian Government Solicitor detailing reasons why the prosecution of Pearson offended the "Prosecution Policy of the Commonwealth" by the Attorney-General. This plea fell on deaf ears and there is some doubt as to whether or not Customs were fully appraised of its contents by the Australian Government Solicitor.

- During preparation of the Stated Case, a draft proffered by Customs contained two paragraphs which were irrelevant and unduly prejudicial. This was brought to the attention of of the Australian Government Solicitor's Office who was given the alternative of agreeing to their deletion or defending their inclusion before Hosking DCJ; agreed to their deletion.

- About one year later and immediately before the Stated Case was to be considered by the Court of Criminal Appeal, counsel for Customs, instructed by of the Australian Government Solicitor's Office made serious allegations to Hosking DCJ against Pearson's solicitor to the effect that he had falsified the Stated Case.

It was plain that the Customs' legal representatives had improperly contacted Hosking DCJ prior to the public accusation in open Court and that His Honour had jumped to an unfavourable conclusion as a result. Counsel for Customs admitted that he had no evidence or other instructions to support this outrageous allegation. Never-the-less, it had the effect of delaying the hearing of the Stated Case by some months. Subsequently, saw fit to lodge a complaint against Pearson's solicitor with the Law Society and the Legal Commission. Those complaints were dismissed and consideration was given to the actions of and his counsel but the absence of a sound recorded transcript saved them from serious trouble.

- It is now obvious that has been improperly using his discredited complaint to mislead senior Customs Officers as to the solicitor's integrity whenever any attempt has been made to make representations to Customs or the Customs Minister. An example may be found in the attached copy of a letter from the former Customs' Minister and this action constitutes a criminal offence, apparently by contrary to Section 171P of the *Legal Profession Act, 1987*

- It is from this point that aggression towards Pearson and Pearson's solicitor has passed from difficult to outrageous.

- On 1st December, 1995, the Court of Criminal Appeal handed down its decision which was highly favourable to Pearson. It rejected the "preclusive effect" submission of the Prosecution, held that there was a "dearth of evidence" to prove that the goods as washer extractors were not dutiable at the rate of 2% in their own right (this would be a complete defence for Pearson - e.g. you cannot "evade payment of duty" if you have paid the correct amount) held that an averment that Customs belatedly sought to rely on was invalid as an averment of law and said that while Hosking DCJ could have regard to the decisions of the Federal Court, he must consider the evidence on which that Court was forced to rely and which was inadmissible in the prosecution. Other restrictions were placed on Hosking DCJ but the possibility that Customs could effectively amend their invalid averment was left open to Hosking DCJ's discretion.

- The decision of the Court of Criminal Appeal came back before Hosking DCJ on 2nd February, 1996 at which time Customs attempted to amend the averment disallowed by the Court of Criminal Appeal. To be effective, the amendment would have to

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aver facts which would permit the Court to conclude that the ambiguous word "cylinder" in TC 8530085 should be interpreted so as to mean the inner "basket" and not the outer cylinder. It would also need to aver facts which would preclude classification under Sub-item 84.40.9 in the Customs Tariff as outlined in Page 34 of the reasons for decision of the Court of Criminal Appeal. It is recorded in the transcript of 2nd February, 1996 that neither amendment was able to be made. The prosecution was able to make a minor amendment to the effect that the capacity of the basket was less than 100 litres but this had never been in dispute and added nothing. At this point, Hosking DCJ was faced with a completed absence of any evidence which would permit him to convict; however, he adopted an attitude of belligerence (described by an on-looker as "going ballistic") and indicated that he was prepared to convict. At this point, Pearson's counsel sought to lead the evidence that Pearson had always wanted to lead (proofs had been prepared and witnesses were available). This evidence would prove affirmatively that Pearson's Customs Agent had correctly entered the goods and that the charges should be dismissed. Hosking DCJ refused to allow such evidence even though he had allowed to Prosecution to re-open their case to attempt to amend the defective averment. One can only speculate at the cause for this outburst.

1. Because of anomalies in New South Wales legislation, a direct appeal from Hosking DCJ was not possible and, on counsel's advice, an application for Certiorari for denial of procedural fairness was made on behalf of Pearson. Pearson attempted to put in issue the correctness of Hosking DCJ's decision as part of the application for Certiorari but Customs countered this by having all documents relating to this issue removed from the file and not considered. As part of his subsequent reason for decision, Meagher JA said that he could see no error but having removed the relevant documents, this naturally followed.

* Pearson applied for special leave to appeal to the High Court. Immediately before this application was heard, Toohey J. explained that the High Court only had the capacity to hear about 100 cases per year and must select those whose resolution would have the widest possible application; the Court should no longer be simply regarded as a Court of Appeal. When the application came on for hearing, one Justice was highly critical of Hosking DCJ not granting leave to Pearson to re-open the defence case and was prepared to grant special leave; however, the 2 remaining Justices were not prepared to grant leave. This was probably the most

successful application dealt with that day, all being refused some quite perfunctorily.

- Having exhausted all other available avenues of appeal (albeit not on the merits) the way seemed open to seek a merit review through Section 474D of the *Crimes Act, 1900*. However, Customs elected to challenge the jurisdiction of the Supreme Court on highly technical grounds having no relation to the merits. Considerable costs were going to be involved so Pearson, who was by now aware of the animus directed to his solicitor by decided to instruct a new solicitor who, in turn instructed Mr. R. Parker Q.C. to advise on the merits. Mr. Parker who is a very senior and eminent counsel with experience in Customs tariff issues at all levels and having no prior contact with this dispute, came to the conclusion that a miscarriage of justice had occurred and pointed to an admission by Hosking DCJ that he had failed to comply with directions given to him by the Court of Criminal Appeal. This opinion was submitted to Customs to support a plea for the matter to be allowed to go through to be considered on its merits and thus save considerable costs on each side. in the Australian Government Solicitor's Office took it on himself to advise senior Customs Officers that Mr. Parker Q.C. was wrong; this is somewhat breathtaking coming unsupported from a solicitor with no experience in Customs tariff issues. Subsequently, had written a detailed letter in which his ignorance of Tariff is manifest.

- As Customs persisted with their attack on the jurisdiction of the Supreme Court the matter was argued before Wood C.J. at C.L. (at considerable expense) and His Honour finally ruled that there was jurisdiction and the Customs' submissions were rejected with costs.

- Wood C.J. at C.L. considered a written application for the matter to be reviewed by the Court of Criminal Appeal. Customs supplied written submissions which were far from accurate but no opportunity was given to make oral submissions or to address any concerns that His Honour may have had in this very esoteric area of the law. After having the matter before him for well over a year Wood C.J. at C.L. handed down his decision on 30th June, 1999 to the effect that he was not persuaded that this was an appropriate case to be sent to the Court of Criminal Appeal. It is apparent from his written reasons that His Honour made many errors of law and fact stemming from the lack of opportunity to address him. Typical and fundamental of his errors is the statement at Paragraph 60 of his reasons that "*The prosecutions would therefore have failed, absent*

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amendment of Averment 6, for lack of evidence as to the dry linen capacity of the machines, this being the critical issue upon which the falseness of the entry turned." As previously noted, the Prosecution did fail to effectively amend their Averment No. 6 as to dry linen capacity. In addition, there was no evidence to negative classification under Sub-item 84.40.9 and this also is a completed defence for Pearson.

- As a result of the many apparent errors in the reasons of Wood C.J. at C.L., a "holding" appeal has been filed reserving the right to file a formal appeal within 60 days. Customs have filed a Notice of Motion which seems to be at least premature but has indicated that a wide variety of abstract issues will be contested none of which goes to the merits of the convictions as well as an appeal (out of time) from the decision of Wood C.J. at C.L. regarding jurisdiction. Properly litigated, such issues could involve costs to both sides of up to $50,000.00 still without addressing the merits of the case. This clearly is a tactic to further drain Pearson's finances so as to crush him into submission; it is a tactic employed far too regularly by Customs and other examples may be quoted where Commonwealth funds have been used improperly to defeat justice. A remark by counsel for Customs on the last occasion that this matter was before the Court confirms that this is the intention of the proposed new issues.

- In summary, all Pearson wants is his "day in court" where he can have a hearing on the merits and be able to call evidence of innocence. The extraordinary and expensive lengths that Customs have gone to to prevent a hearing on the merits demands an explanation especially because it so offends accepted prosecution ethics. The extreme mala fides revealed in letter (referred to below) to the Law Society is concentrated on Pearson and his solicitor but also extends to other importers and there is corroborating evidence to support claims. The tactic of using the financial esources of the Commonwealth to crush litigation opponents can also be well demonstrated.

OTHER MATTERS

There has long been evident the most intense animus coming from two solicitors in the Australian Government Solicitor's Office and a similar number of Customs Officers. These persons have gone to extraordinary lengths to avoid any hearing on the merits and it is clear that they realise that the outcome of such a hearing would favour Pearson and bring into question the vast sums of money expended. The manipulation of

many times discredited complaint to the Law Society is an offence but has now brought him undone in a much more serious manner. Following his last request for his original complaint to be reconsidered, the Law Society has called for a report by and this has revealed a quite unacceptable attitude and practises by the two solicitors. There are also allegations of an attempt to suborn a witness and perversions of the course of justice. There seems to be a wealth of corroborating evidence to support the allegations.

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ANIMUS IN PEARSON

For early indications of animus towards all importers of small industrial laundry machines see the document headed "Customs v Commercial Laundry Machines"

Animus directed at Pearson seems to have commenced when he thwarted Customs plans to extract duty at the domestic rate and not at the lower commercial rate with the decision in the Federal Court; although it was Pearson's first foray in this area, his success comes at the end of a series of defeats for Customs. Clearly Customs were trying to extend some unofficial and illegal "tariff protection" to Email Pty. Ltd. who were producing domestic goods of extremely poor quality so that some domestic users were prepared to pay double the price for a reliable commercial machine.

At least two Legal Officers in the Australian Government Solicitor's Office were prepared to assist in procuring a miscarriage of justice once the Pearson prosecution was commenced and the so-called "preclusive effect" submission which effectively prevented Pearson from defending the prosecution charges on the merits was utilised. Having been a prosecutor in the Australian Government Solicitor's Office and the superior of both of these Legal Officers, I accosted the Legal Officer who had the carriage of the matter in the Local Court and said words to the effect "You know that the Crown does not do this, it is contrary to prosecution principles". He replied "Look, the office is going to be privatised and clients will be able to chose their own solicitor. We think that 30 Legal Officer positions will be lost if we don't give the clients what they want so we don't follow those rules anymore".

Pearson was inevitably convicted when the Magistrate accepted (wrongly as it later was held by the Court of Criminal Appeal) the "preclusive effect" argument and Pearson's Customs Agent, whose decision it was to enter the goods as they were, made representations in the presence of another, firstly, to Customs Officer Greg Collins, who had the carriage of the matter for Customs. He was told words to the effect "But we know that they are really domestic machines" thus indicating that the prosecutions were a "pay-back" for proving Customs wrong yet again on the domestic/commercial issue and also a refusal to accept the obviously correct decision of the Federal Court.

The agent then approached Customs Officer John Hawkesworth who made a similar statement.

There then followed a series of proceedings in various courts where the prosecution repeatedly used devices to prevent a hearing on the merits being obtained. These are detailed in the document headed "Chronology of Prevention of a hearing on the merits in Pearson by Customs". At least five (5) instances are detailed and a sixth is threatened.

An escalation of animus took place on 28th February, 1995 when I was summoned without notice to Judge Hosking's Court where I was accused in open court of falsifying the Stated Case signed a year before by deleting two paragraphs. This false accusation was laid by Mr. P.Roberts of counsel instructed by Mr. Roberts acknowledged that he had no instructions to justify his allegations but asserted that the solicitor who previously had carriage of the Stated Case would not have agreed to the amendment. In fact that solicitor had agreed to the deletion of the two paragraphs which were irrelevant to the issues in dispute and were highly prejudicial. Such an allegation could lead to both Mr. Roberts and his instructing officer being struck off the rolls of practitioners as had happened in the case of Mr. Peter Clyne some years earlier.

During the next weeks, there was a flurry of activity where those responsible for the allegations sought desperately to extricate themselves even by trying to justify their actions ex post facto. Fortunately for them, the proceedings were not sound recorded and the shorthand court reporter failed to get a completely accurate transcript although seemingly sufficient.

A complaint was lodged by Mr. Martin Churchill, solicitor, in whose office I was then working on the strong recommendation of Mr. T. Healey of counsel. Ultimately, it was decided that the evidence of the imperfect transcript was insufficient to deal with those responsible in such a serious matter.

has lodged a "tit-for-tat" complaint against me with the Law Society but it was rejected. Over the years, has, from time to time, requested the Law Society to review their decision and has been unsuccessful each time. He has recently again asked for review.

I was puzzled by obsessive persistence with a complaint which was plainly negated by the transcript for the vital day but I have

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recently been advised that, whenever I raise issues that are difficult to deal with, his tactic is to discredit me by saying to his client words to the effect "you can't take notice of Benson, he is being investigated by the Law Society". Coincidentally, I have been making the strongest representations yet now that I have, for the first time, been provided with the reasons advanced by his Office for saying that the independent advice of Mr. Parker Q.C. is wrong and his fresh request for his complaint to be again re-investigated seems linked to this as my advice from Canberra is that he has used the tactic of referring to the investigation of his new request as a means of discrediting me.

An examination of the correspondence from to myself will show intemperate language.

It seems clear that is aware that the convictions were wrongly obtained but is determined to maintain them never-the less.

COMMENT

This matter combined with others that I act in plus others in which other solicitors are involved clearly show that the unacceptable "culture" identified in the Commercial Investigation area of Customs by the Senate Select Committee is alive and well despite the multi-million dollar expenditure in reparations and attempts to eradicate it . The undesireable officers had been reduced in numbers for a few years but are now spreading their practices to newcomers - see attached. A new dimention has been added in that some solicitors in the Australian Government Solicitor's Office are now actively assisting the recalcitrant officers.

321 Macquarie Road,
Springwood, NSW 2777

Mrs Elizabeth MacConachie,
Professional Standards,
Law Society of NSW,
170 Phillip Street,
SYDNEY NSW 2601

29 June
~~26 January~~ 1999

By facsimile: 9221 5804

Dear Mrs MacConachie,

Complaint against Mr Reg. Benson by

I refer to our recent telephone conversation.

I am most concerned that my name is being improperly used in vendetta against Mr Reg. Benson.

I was born on 12 December 1942. I was admitted as an Attorney, Solicitor and Proctor of the Supreme Court of New South Wales on 25 November 1966. I commenced working as a solicitor in the Commonwealth Deputy Crown Solicitor's Office on 28 August 1967. (The name of that office was later changed to the Australian Government Solicitor's Office.) I retired on 2 February 1999.

In June 1994 I had the carriage of a Customs Prosecution against Neil Harold Pearson & Co. Pty Limited and against Neil Harold Pearson. Mr Reg. Benson acted for the defendants. The defendants were convicted in the Local Court and appealed to the District Court where the appeal was by way of rehearing. At the conclusion of the hearing on 14 June 1994, Counsel for the defendants asked the Court to state a case to the Court of Criminal Appeal. The events which followed are set out in my affidavit dated 24 March 1995, of which I understand that you have a copy.

I had discussions with Mr Benson. I understood those discussions to relate to alterations in the format of the Stated Case to comply with the requirements of the Court of Criminal Appeal Registry. I did not understand those discussions to relate to the text of the Stated Case which had been agreed between our respective Counsel. It is quite clear that Mr Benson and I were at some point in those discussions at cross-purposes.

In September and October 1994 I was in Scotland gathering affidavit evidence for the defence of detinue proceedings being brought against the Collector of Customs by D'Aquino Bro. Pty. Limited arising from the seizure by Customs Officers of a container tank of Scotch whisky. In January and February 1995 I was again in Scotland for the taking of evidence on commission in those proceedings, in the Sheriff Court of Glasgow and Strathkelvin, pursuant to an Interlocutor of the Inner House of the Court of Session.

The Stated Case was to be listed before the Registrar in the Court of Criminal

Appeal while I was in Scotland, so I arranged with my colleague Mr Alexander McLeod Walker to attend for me. I understand that there may be some dispute by in this regard.

While I was in Scotland I had a number of telephone conversations with It was practice to telephone me in the afternoon, Eastern Australian Time, so that in Glasgow in Scotland it was the early hours of the morning according to Greenwich Mean Time. On one such occasion in late February 1995 he said to me words to the effect, "Benson has altered the Stated Case that was agreed between Roberts and Ronzani. He says that you agreed to it." I said words to the effect, "I didn't agree to that. I did agree to changes to the format to comply with the Rules but I didn't agree to any changes to the agreed text."

On my return from Scotland to New South Wales, said to me words to the effect, "I want to nail Benson. I want you to give me the evidence to do so. If you don't, I'll conclude that you entered into a conspiracy with Benson. It's Benson or you."

This approach adopted by put me in a very difficult position. No doubt that was intention. I did not believe that we were dealing with anything other than the result of an unfortunate misunderstanding - irritating, time-wasting, frustrating, annoying, but nothing more sinister than that. I did not believe that Mr Benson had done anything dishonest. But as an officer of the Commonwealth Public Service I was legally obliged to carry out lawful directions. My belief that the action which intended against Mr Benson was unjustified, inappropriate and undignified would not be a defence to a charge under the Public Service Act (Commonwealth) of failing to carry out a lawful direction.

The threat by that he would conclude that I had conspired with Mr Benson was particularly worrying. It was not that I feared a formal charge. I had not conspired with Mr Benson, there was no evidence against me and I could have no conceivable motive for entering into such a conspiracy with Mr Benson. However, if stated that as a suspicion to his superiors, then that slur could continue to damage me for years without my ever having a proper opportunity to defend myself. I have known of other similar instances in the Australian Government Solicitor's Office both before and since.

So, having been directed to produce an affidavit, accordingly, under duress, I duly did so, on 24 March 1995. In my affidavit of that date I confined myself strictly to the facts to the best of my knowledge, belief, understanding and recollection. objected that my affidavit was insufficiently incriminatory of Mr Benson. I endeavoured to mollify him (not very successfully) by pointing out that I could only depose as to what I could say on oath and be cross-examined upon. I suggested to that the Court of Criminal Appeal was unlikely to interest itself in the matter in the way in which I gather he hoped.

Shortly thereafter I had a conversation with who was immediate supervisor. I told that I did not not think that the Court of

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Criminal Appeal would want to involve itself in this way. He said words to the effect,"Oh, I think they'll take a very serious view of it. I want to see Reg Benson struck off." In that conversation, as he had done on several previous occasions, expressed resentment of the fact that a client of Mr Benson had complained to the Ombudsman about a matter of which had the carriage.

As I had accurately predicted, the Court of Criminal Appeal took no action of the kind for which and had expressed their hopes. Accordingly, then made a complaint to the Professional Standards Committee of the Law Society against Mr Benson.

Shortly thereafter, I had a conversation with who was then Director of Legal Services in charge of the Sydney Office of the Australian Government Solicitor's Office, in reference to the complaint which had made to the Law Society against Mr Benson. I said words to the effect, "I don't think this is the sort of thing the Crown Solicitor's Office, or the AGS now, would involve itself in." He said, "Well, it's not being done by the Office." I said, "Yes, but I don't think there's anything in it." said, "Don't you, ?" I said, "No, and I've been proved a true prophet. I said that I didn't think the Court of Criminal Appeal would take it up and they didn't." He said, " and have really got it in for Benson." I said, "I know, but I don't think like that. I know that Reg Benson can be very irritating but I don't think a complaint to the Law Society is a sensible response." said, "Yes, hopefully it'll all blow over shortly." I said, "Let's hope so."

Not long after that transferred to Melbourne as Director of Legal Services in charge of the Melbourne office of the Australian Government Solicitor. I understand that he has since retired.

At this point I would interpolate the somewhat obvious comment that if the complaint were in fact an official complaint by the Australian Government Solicitor, it would be signed by the Director of Legal Services in charge of the Australian Government Solicitor's Office in New South Wales and would annex a statement by me (as the solicitor having conduct of the matter at the relevant time) setting out the facts and indicating the dishonest conduct of which I believed Mr Benson to be guilty. Yet, as I understand, no such signature and no such statement have ever been furnished to you.

and each suggested to me that I should myself complain to the Law Society against Mr Benson. I said to each of them individually that I was not willing to do so. Obviously, I could not lawfully be directed to make a private complaint in my own name, so they both left it at that.

I note that appears to have an obsessive fixation about Mr Benson. Having worked with both gentlemen over a number of years, attitude leaves me at a loss. I know of nothing which would justify it or palliate it. I gather that it may originate from some personal grudge from the time when Mr Benson was supervisor.

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I am not myself in regular contact with Mr Benson. The correspondence between himself and myself in the course of the Customs Prosecution of Neil Pearson and Neil Pearson's company will indicate that at times we were very irritated with each other. Some of the stances Mr Benson took at that time are matters to me of personal regret and sorrow. However, throughout that time we were always able to communicate with each other in a manner befitting professional gentlemen who had the honour to be Attorneys, Solicitors and Proctors of the Supreme Court of New South Wales.

Through a chance meeting with Mr Benson in the street recently I learned to my surprize and annoyance that complaint against Mr Benson remains on foot and that my name is being used in that connexion. I had understood that complaint had been very properly disposed of years ago.

I do not entertain any personal animosity against Mr Benson and have never done so. I do believe that the Law Society disciplinary process ought never be used as an instrument for personal animosity and spite. At all relevant times, I felt that Mr Benson was endeavouring to carry out his duty to his client as I was to mine. I do not believe that Mr Benson ever intended to deceive me. I do not believe that Mr Benson ever intended to mislead the Court. I protest against my name being used in ridiculous personal vendetta against Mr Benson. I respectfully submit that this use of my name is not proper professional conduct by a solicitor. I respectfully request the Professional Standards Committee of the Law Society of New South Wales to bring this matter to an end once and for all.

I am willing to provide further information if required. I will testify to the foregoing on oath if required. If that be necessary, I will be sworn in Scottish form as authorized by the relevant section of the Oaths Act 1900 (New South Wales).

I shall look forward to hearing from you in this regard at your earliest convenience.

Yours sincerely,

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For hearing at the Local Court St James Centre, 111 Elizabeth Street, Sydney,
on the day of 19

INFORMATION (GENERAL PURPOSES)

NEW SOUTH WALES	)
111 ELIZABETH STREET	) SECTIONS 234(1)(a)
SYDNEY TO WIT	) CUSTOMS ACT 1901

BE IT REMEMBERED that on this day of in the year of Our Lord one thousand nine hundred and at Sydney in the State of New South Wales THE COMPTROLLER-GENERAL OF CUSTOMS, by an officer of Customs duly delegated by the said Comptroller-General of Customs to institute this Customs prosecution in the name of the said Comptroller-General of Customs appears before me, the undersigned, one of Her Majesty's Justices duly assigned to keep the Peace of Our Lady the Queen in and for the State of New South Wales, and informs me on oath and avers that NEIL PEARSON & CO PTY LIMITED a company duly incorporated in and in accordance with the laws of New South Wales and having its registered office situated at 103-105 Silverwater Road Silverwater in the said State did, on or about the 22nd day of January 1987 at Sydney in the said State, evade payment of Customs duty of $2,267.18 which was payable in respect of 48 Maytag A512 Washing Machines (hereinafter call "the goods") in that $490.18 was paid whereas an amount of $3,676.36 was in fact payable.

AND the said Comptroller-General of Customs further avers that:

1. The said Wendy Irene Honey is an officer of Customs currently holding a position to which the said Comptroller-General of Customs has delegated his powers to bring this customs prosecution.

2. The said Neil Pearson and Co Pty Limited caused the goods to be brought from parts beyond the seas into the Port of Sydney on or about 19 January 1987 and the goods were discharged there;

3. The said Neil Pearson and Co Pty Limited caused a form of entry from Home Consumption to be delivered to the said Collector of Customs in respect of the goods on 20 January 1987. This entry was numbered 1S7020.0055N;

4. The said entry 1S7020.0055N contained the particulars that the goods were classified to tariff sub-item 84.40.200 and BY LAW 8530085 and that the duty rate was 2%;

5. The said BY LAW 8530085 related only to washing machines, washer extractors and tumble dryers, having a dry linen capacity NOT less than 10kg/batch and classified to tariff sub-item 84.40.200;

6. Each of the washing machines in the goods contained a dry

linen capacity of less than 10kg/batch;

7. The value for duty of the goods was $24,509.09 Australian;

8. On or about 22 January 1987 duty in the sum of $490.18 was paid for the goods;

9. The duty that was correctly payable for the goods was $3,676.36;

WHEREUPON the said Comptroller-General of Customs prays that I, the said Justice, will proceed in the premises according to law,

Exhibited at Sydney in the said State on the day first above written before me -

Justice of the Peace.

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susceptible to correction, if correction is sought, by asking me to state a case.

ROBERTS: 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 about the dry linen weight of washing machines. I would not be doing that at all under any circumstances. If your Honour were against me on the question of law, we would see it as such a serious matter that we would be asking your Honour to state a case.

HIS HONOUR: Mr Burbidge has said that he is anxious within limits that he will set in discharge of his professional duties to narrow the issues, but he has put you on notice that he is not prepared to argue the question of law and then if that is resolved adversely to the Department to have you call a deal of evidence.

ROBERTS: I have indicated I will not be calling people to prove the dry linen capacity of these washing machines, no matter what, so we will be relying on our position of law and we will not be calling that evidence. If we are wrong, so be it.

HIS HONOUR: Is it appropriate to divide the two batches up?

ROBERTS: I do not think it is necessary, your Honour.

DECISION OF FULL FEDERAL COURT DATED 8 MARCH 1991 IN THE MATTER OF NEIL PEARSON & CO PTY LIMITED V COLLECTOR OF CUSTOMS TENDERED. ADMITTED AND MARKED EXHIBIT A.

COPY DECISION OF WILCOX J IN ABOVE MATTER TENDERED. ADMITTED AND MARKED EXHIBIT B.

SHORT ADJOURNMENT.

ENTRY FOR HOME CONSUMPTION NO. A62120310 TENDERED. ADMITTED AND MARKED EXHIBIT C.

ENTRY FOR HOME CONSUMPTION NO. A62440715 TENDERED. ADMITTED AND MARKED EXHIBIT D.

ENTRY FOR HOME CONSUMPTION NO. A63020841 TENDERED. ADMITTED AND MARKED EXHIBIT E.

ENTRY FOR HOME CONSUMPTION NO. A63220690 TENDERED. ADMITTED AND MARKED EXHIBIT F.

ENTRY FOR HOME CONSUMPTION NO. 1S63580255M TENDERED. ADMITTED AND MARKED EXHIBIT G.

ENTRY FOR HOME CONSUMPTION NO. 1S70200055M TENDERED. ADMITTED AND MARKED EXHIBIT H.

ENTRY FOR HOME CONSUMPTION NO.1S70330680H TENDERED. ADMITTED AND MARKED EXHIBIT J.

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).

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

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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.

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HIS HONOUR: Now, Judges are required to go through every line of evidence, analyse every averment. I have found the offence proved, and whilst the Court of Criminal Appeal Judgment wasn't a ringing endorsement of the approach I took, the fact of the matter is it's back here to be dealt with according to law with a couple of matters needing to be tidied up.

ROBERTS: Well your Honour, all I need say is if later in the piece your Honour thinks that this averment doesn't do the job that it sets out to do, then of course there's nothing to stop us amending again--

HIS HONOUR: And the right to amend is a very wide one, and there's really no time limit - I suppose it could even arise during the course of giving Judgment.

ROBERTS: It can arise on an appeal, and it has occurred on those occasions.

HIS HONOUR: Yes.

ROBERTS: Your Honour, therefore, I won't take any further time because we think (a) does the job, but it doesn't--

HIS HONOUR: At this stage, Mr Roberts no longer presses the amendment to Averment 6(b), and accordingly it becomes unnecessary for me to rule upon it, the application no longer being pressed. Yes, Mr Healey?

HEALEY: If your Honour pleases, I'm just taking some instructions in respect of that matter now, in so far as it--

HIS HONOUR: What do you mean you're taking some instructions?

HEALEY: I'm just taking instructions from my instructing solicitor in respect of the effect of that upon the way in which we conduct the case, that's all.

HIS HONOUR: But that's your responsibility, isn't it?

HEALEY: Indeed it is, your Honour, but I just want to take some instructions from him as to the way in which I conduct it, you see, hereafter. Your Honour, could I just have a five minute adjournment? I seek your Honour's indulgence. There is a matter of some concern as to the way in which we conduct the appeal following your Honour's ruling in respect of that matter--

HIS HONOUR: What ruling?

HEALEY: Your Honour's ruling in respect--

HIS HONOUR: I haven't made a ruling.

HEALEY: Your Honour has declined - you've exercised a discretion in respect of the amendment to--

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ANNEXURE "H"

EXTRACTS FROM THE REASONS FOR DECISION OF THE COURT OF CRIMINAL APPEAL WHICH SHOW THAT THE FINDINGS OF FACT MADE BY THE ADMINISTRATIVE APPEALS TRIBUNAL WERE NOT ADMISSIBLE IN A PROSECUTION - THE DECISIONS OF THE FEDERAL COURT, BEING BASED ON THOSE FINDINGS OF FACT, WERE ONLY RELEVANT AS TO THE PRINCIPLES OF LAW CONTAINED THEREIN BUT NOT AS TO CONCLUSIONS DRAWN FROM FACTS FOUND IN THE TRIBUNAL.

EXTRACTS	PAGES
"It was not necessary for Deputy President Bannon to consider whether the T.C.O. applied in view of his decision that the machines fell within Item 84.40.1"	*6.9, 7.1*
"Appeals from the Administrative Appeals Tribunal to the Federal Court are limited to corrections of law".	*8.1, 19.4, 26.9*
"However, the Tribunal, which determines the facts is a non-judicial body. It is not bound by the rules of evidence".	*19.5*
"It cannot be said that the capacity in which the appellants conducted their litigation in the Federal Court cases is the same as their capacity in answering criminal charges"	*19.4*
"The factual findings in the Federal Court cases were reliant on the decision in the Administrative Appeals Tribunal, a non-judicial body not, as such, bound by the rules of evidence."	*21.2*
"The challenge simply recognises that, in a criminal trial, the law requires that the guilt of an accused be proven beyond reasonable doubt, on the basis of factual findings made pursuant to the strict rules of evidence in that trial."	*21.3*
"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."	*23.9 - 24.1*
"It is a fundamental principle of the criminal law that the prosecution must prove the guilt of the accused beyond reasonable doubt. This requirement extends to proving each of the relevant elements of	*19.3*

an offence beyond reasonable doubt. Courts should resist any attempt to reduce the operation of this standard of proof in criminal cases."

"In the present circumstances, it cannot be said that the decisions in the Federal Court were made against the same evidentiary background as exists in the criminal proceedings. There is not merely a different burden of proof. The factual findings in the Federal cases were reliant on the decision in the Administrative Appeals Tribunal, a non-judicial body, not, as such bound by the rules of evidence." 21.1

"These matters should be taken into account by Hosking DCJ when reviewing his factual findings. His Honour will still be faced by a dearth of evidence on the distinction between, and the proper classification of, washing machines and washer extractors." 34.5

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With respect, the material is of vital assistance to the Applicants since it proves that the "dry linen capacity" calculated in accordance with the deeming "Note" in TC 8530085 exceeds 10 Kilograms per batch and complies with the TCO. It is also relevant to the identification of the machines as goods falling within Sub-item 84.40.9.

The documents referred to are proofs of evidence of expert witnesses whose evidence is normally used in classification disputes - see Paragraph [503] in the text book. The Prosecutor, Mr. Roberts, has implicitly conceded that this evidence is the accepted way of litigating classification issues by his opening address recorded at Page 4 of the brief where he declares that he wishes to avoid this process.

The expert witnesses do not go further than giving opinion as to which cylinder controls the capacity to wash or identify the machines as washer extractor. This is the normal type of expert evidence and is not usually objected to as being the ultimate issue since those factual opinions remain to be interpreted by the Court.

58. This Paragraph omits what is said at Page 2 of the brief, namely that the word "material" should have been read into S. 234 (1) (d) at the relevant time. In the decision of the High Court in *Murphy v Farmer* which was in respect of a parallel provision applying the penalty of forfeiture of goods entered with "false" particulars, it was held that the word "material" should be read in. Subsequently, the legislature amended Section 234 (1) (d) to include the word "material" and it is submitted that only material falsities are punished by the section. In any case the informations only particularise "By law/MD 8530085" and the 2% rate of duty as being the falsities complained of.

60. This Paragraph is vital in that it admits that, if the amendment of averment 6 failed, the prosecutions would have failed. As previously demonstrated, the amendments did fail in that they did not succeed in averring how the "formula" in TC 8530085 was to be applied. As was said by the Court of Criminal Appeal at the bottom of Page 27:

> *"The formula must be applied. But it requires interpretation of the word "cylinder". As the proceedings in the Federal*

Court showed, there is a real question as to which cylinder is relevant for the purposes of the formula, the inner or outer cylinder."

At Page 28 the Court of Criminal Appeal said:

> *"In this way, it would have left the application of the formula including decisions as to the relevant cylinder, a question of law, to the court of trial."* (emphasis added).

Being a question of law, the selection of the relevant cylinder could not be averred for the same reasons that the original Averment 6 was held to be invalid by the Court of Criminal Appeal. In addition to other reasons including the absence of evidence in the Federal Court (see Annexure "H" to the original Application) and the manner in which he chose to approach this question by relying on Averment 6, Hosking DCJ could obtain no help from the amendment in deciding which was the relevant cylinder.

The foregoing deals with the legal approach applicable in an appeal. However, it is submitted that, in an application pursuant to Section 474D of the *Crimes Act, 1990*, the relevant question is what is the **TRUE** position i.e. applying the "formula", is the "dry linen capacity" in excess of 10 Kg/batch? That question is answered in the affirmative by expert evidence of the type demonstrated in Annexures "L", "M" and "NO".

The limited amendment to Averment 6 also totally fails to address the *"dearth of evidence"* regarding identification of the machines as "washer extractors" referred to by the Court of Criminal Appeal in Page 34 of the reasons of Kirby ACJ. The prosecution should fail on this ground also.

61. Averment 6 was never fully amended and 6 (a) did no more than state the "volumetric cylinder capacity" of the inner cylinder which was never in dispute. The proposed amendment went on, in 6 (b), to designate the inner cylinder as the relevant cylinder but this part of the averment failed as an averment of law and was abandoned. This left no evidence on which Hosking DCJ could rely to determine the relevant cylinder since the Court of Criminal Appeal held that the facts found by the Administrative Appeals Tribunal