



RECEIVED
29 JAN 2004

BY: *Gillian Gould*

Ms Gillian Gould
Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Ms Gould

**Inquiry into the Averment Provisions in Australian Customs Legislation
Impact of the decision in Nazih El Hajje v CEO of Customs**

I refer to my letters dated 8 May 2003 and 10 November 2003 to the House of Representatives Standing Committee on Legal and Constitutional Affairs ("Standing Committee") Inquiry into the Averment provisions in Australian Customs Legislation enclosing comments made by the Customs and International Transactions Committee ("the Committee"). I now enclose some further comments from the Committee.

Please note that these comments have been endorsed by the Business Law Section but have not been endorsed by the Council of the Law Council of Australia.

Background

As you would be aware, the Standing Committee received a submission ("Submission") from the Committee. Members of the Committee also appeared before the Standing Committee on 23 June 2003 to provide additional information and answer questions of the Standing Committee.

A letter dated 10 November 2003 was subsequently forwarded to the Standing Committee regarding the High Court decision in **CEO of Customs v Labrador Liquor Wholesale Pty Ltd and others** [2003] HCA49 and its implications for the use of averments in Australian Customs Legislation. I would appreciate acknowledgement of receipt of my letter dated 10 November 2003.

Judgment in the Nazih El Hajje case

The purpose of this letter is to provide the Standing Committee with additional information regarding the decision of the Court of Appeal of the Victorian Supreme Court in the Nazih El Hajje v CEO of Customs [2003] VSC 217 which decision was handed down on 17 December 2003 ("El Hajje decision") and its implications for the use of averments in Australian Customs Legislation. For these purposes, while the El Hajje

Decision related to the use of Averments in the Excise Act 1901, the provisions are identical to those in the Customs Act 1901 and identical considerations apply.

I am now pleased to provide the Standing Committee with a copy of the judgment of the Court of Appeal of the Supreme Court of Victoria in the El Hajje Decision which is only very short in length.

The judgment deals, in part, with the issue as to whether the Appellant had properly been denied an adjournment of the initial proceedings to secure additional legal advice. However, for current purposes, the direct relevance of the judgment are the findings regarding the use of averments by the Australian Customs Service in support of their prosecution of the Appellant. As can be seen, the Court of Appeal found that the Australian Customs Service had improperly used the averment process to establish that a process of manufacture had taken place in respect of cut tobacco which triggered liability for the Appellant pursuant to Section 117 of the Excise Act 1901. As a result, the Court of Appeal found that there was no evidence before the trial judge on which he could have found that the Appellant was in possession of manufactured or partly manufactured excisable goods and therefore the offence against Section 117 of the Excise Act had not been established.

Conclusion - Impact for use of Averments

The Committee had previously brought to the attention of the Standing Committee a number of cases in which Courts have found that the Australian Customs Service had improperly used averments. The El Hajje case represents another example where averments have been improperly used against a defendant. In this case, that improper use resulted in a conviction having been entered and a penalty having been issued against the Appellant. It was only when the matter was transferred to the Court of Appeal that the incorrect nature of the averment and the improper conviction were established. The improper use not only had led to an improper conviction but also significant expense and inconvenience to the parties in the matter being decided before the Court of Appeal of the Victorian Supreme Court.

The Committee is of the view that the improper use of the averment in the El Hajje matter reflects at least (4) concerns set out in earlier material forwarded to the Standing Committee.

1. The Court of Appeal identified that the misuse had occurred in a technical and legally complex matter. This suggests either an inability to use averments properly by the prosecuting authority or a failure to use them with due care. Indeed, even the Trial Judge appeared to incorrectly rely on the averments. This also underlines the problems with their use.
2. The improper use of the averment may have been overcome with proper evidence being provided as to the "manufacture of tobacco". Surely this evidence should (and could) have been readily obtained rather than relying on an averment.

3. The averment was used in a prosecution where the defendant was unable to properly analyse or defend the use of averment due to his particular circumstances. This provided the prosecuting authority with a significant (and unfair) advantage.

4. Customs and Excise prosecutions require proof beyond reasonable doubt yet reliance was placed predominantly on averments which only, at best, constitute prima facie evidence of certain facts.

It is the view of the Committee that the El Hajje Decision constitutes another example of the problems which should mean that the Averment provisions of the Customs Act 1901 and the Excise Act 1901 should be abolished, or, at the very least, amended in the manner contemplated by the Submission.

The Committee would welcome the opportunity to provide additional evidence to the Standing Committee. The Committee would also be grateful if you would provide an update as to the current status of the Inquiry.

Yours Sincerely



Michael Lavarch
Secretary General

29 January 2004