



House of Representatives Standing Committee on
Legal and Constitutional Affairs

**Inquiry into averment provisions in
Australian customs legislation**

Inquiry Information

April 2003

**House of Representatives Standing Committee on Legal and Constitutional
Affairs**

Chair:

Hon Bronwyn Bishop MP

Deputy Chair:

Mr John Murphy MP

Ms Julie Bishop MP

Hon Alan Cadman MP

Hon Duncan Kerr MP

Mr Daryl Melham MP

Ms Sophie Panopoulos MP

Hon Con Sciacca MP

Mr Patrick Secker MP

Dr Mal Washer MP

**Parliament House
Canberra ACT 2600
www.aph.gov.au/house/committee/laca
ph 02 6277 2358; fax 02 6277 4773**

INQUIRY INTO AVERMENT PROVISIONS IN AUSTRALIAN CUSTOMS LEGISLATION

1. Introduction

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. This inquiry follows the Committee's review of the Australian Customs Service Annual Report 2001-2002.

The Committee will gather evidence relating to the terms of reference before considering the evidence and forming conclusions and recommendations. Formal evidence may consist of written evidence (submissions) and oral evidence taken from witnesses at public hearings.

This information booklet contains material which may assist those people and organisations preparing submissions. It is intended to stimulate discussion and assist those who wish to make a submission addressing the terms of reference.

This booklet includes:

- the terms of reference (see below);
- information about the inquiry process (pages 4-5);
- information about averment provisions in customs legislation (pages 5-6); and
- advice on preparing a submission (pages 7-8).

Submissions addressing the terms of reference should be sent for receipt **by Friday 9 May 2003** to:

The Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

For further information about the inquiry, please contact the Inquiry Secretary, Frances Gant, on 02 6277 2358.

**House of Representatives
Standing Committee on Legal and Constitutional Affairs**

Terms of Reference

The Committee shall inquire into the use of averment provisions as contained in the Customs Act 1901. The Committee will examine cases that have relied on averment provisions in Australian customs prosecutions.

2. Inquiry Process

2.1 The inquiry was advertised on Wednesday 2 April 2003.

Submissions

2.2 The Committee invites submissions to the inquiry. They should be received no later than **Friday 9 May 2003** and it would be helpful if submissions could be sent before then. If it is not possible to meet the deadline, please phone the secretariat on (02) 6277 2358 to request an extension of time from the Committee.

2.3 The Committee depends on submissions and oral evidence for views on the issues raised in the terms of reference. Each submission is considered individually and may be accepted as evidence to the inquiry. The overriding requirement is that the submission be **relevant to the terms of reference**. If a writer wants his or her submission to be kept confidential, he or she should make the request clearly at the top of the submission and the Committee will consider the request.

An important point about 'form letters'

2.4 Committee inquiries sometimes attract numerous copies of similar letters ('form letters') from members of particular organisations with an interest in the subject matter of the inquiry.

2.5 In conducting inquiries, committees are looking for arguments relevant to the terms of reference. The number of people sharing a particular view is not as significant as the arguments put forward in favour of, or against, a particular position. For this reason, the Committee would prefer to receive submissions addressing the terms of reference rather than form letters. Form letters will not be treated as individual submissions.

2.6 If you belong to an organisation with an interest in this inquiry, please check if your organisation is preparing a submission to this inquiry. You may be able to contribute to the organisation's submission. Due weight will be given to the fact that the organisation's submission represents the views of its members. However, this does not prevent members of organisations from providing the Committee with individual submissions.

Submissions should be sent to:

The Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

If you would like to discuss any aspect of the inquiry, please contact:

The Committee Secretary or the Inquiry Secretary
E-mail: laca.reps@aph.gov.au
Phone: 02 6277 2358
Fax: 02 6277 4773

Public hearings

2.7 All submissions received will be read and analysed. On the basis of this analysis, invitations will be issued by the Committee to some submission writers to give further evidence at public hearings to be arranged by the Committee. At such hearings, Committee members usually discuss the submission with the writer and ask questions relating to the submission. Witnesses are usually given 30 minutes to an hour to present their views to the Committee and to answer questions relating to their submissions. Information about public hearings will be posted on the Committee's webpage from time to time (www.aph.gov.au/house/committee/laca).

2.8 The secretariat will contact witnesses invited to appear before the Committee. The secretariat will advise them about the place and time of the hearing and the procedures that are followed. Witnesses will usually be contacted first by telephone and the call will be followed by a letter confirming the details. Those not appearing as witnesses are welcome to attend public hearings as observers.

Reporting

2.9 After all the submissions have been read and the Committee has discussed the subject during public hearings, members form their views and a report is written on the findings of the inquiry, including the Committee's recommendations. Once the majority of members agree on a report, it is presented to the Parliament and then becomes available publicly. The Government will then consider the recommendations and make an official response to them. If the Government agrees with the Committee's conclusions and recommendations, the changes are implemented either by making new laws or changing the way that Government programs are administered.

2.10 The Committee is expected to report to Parliament before the end of the year. The Committee's report will be made available on the Committee's website after it has been presented to Parliament, and a limited number of hard copies will also be printed.

3. Averment Provisions in Customs Legislation

3.1 Averments are statements of fact made by a prosecutor, which are considered as *prima facie* evidence of the matters stated (or averred). In other words, averment provisions provide that the statement be taken to be proven unless the accused produces evidence to the contrary. Perhaps the most significant point to be made about averment provisions is that they shift the onus of proof with regard to the matter averred on the defendant. It is generally accepted however that averment provisions only impose an *evidentiary* as opposed to *persuasive* burden¹ on the defendant.

3.2 Section 255 of the *Customs Act 1901* provides for averments in customs prosecutions. The Act also provides for averments in recovery actions under Section 35A.

¹ See Parliamentary Paper No.319/1982 – 1982 Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings*, p. 7 for a discussion of the differences between evidentiary and persuasive burden.

Section 255 provides:

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. The 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.

3.3 There has been significant debate over averment provisions, not only in relation to customs and excise matters, but criminal proceedings in general. The use of averments in relation to customs, however, is considered to be useful for a number of reasons. This may be due to:

- the extra-territorial nature of customs business i.e. often the evidence is located overseas;
- the facts of the case being within the knowledge of the defendant; and
- evidence being difficult to obtain and/or expensive to prove.

3.4 On the other hand, it may be thought that there is considerable potential for overuse and abuse of averment provisions, and that such provisions violate fundamental principles which impose an obligation on the Crown to prove every element of its case beyond reasonable doubt.²

3.5 Some issues raised with regard to averment provisions include:

- what, if any, limitations should apply to the use of averments;
- whether any potential limitations should be regulated by legislation; and
- whether averment provisions place an unreasonable burden on defendants.

3.6 As part of its inquiry, the Committee will examine these, and other issues associated with averment provisions, as set out in Australian customs legislation. The Committee expects to make a number of recommendations concerning the appropriateness of these provisions.

² Australian Law Reform Commission, Report 60, p. 151.

PREPARING A SUBMISSION TO A PARLIAMENTARY COMMITTEE INQUIRY

The following advice is offered to assist those wishing to make a submission to a parliamentary committee.

The main purpose of parliamentary committees is to carry out investigations and report the findings of those investigations to the Parliament. Each inquiry has terms of reference which outline the matters to be considered by the committee.

As part of the inquiry process, a committee seeks written submissions addressing the terms of reference.

Who can make a submission?

Any individual or organisation can make a submission to a parliamentary committee.

What should be in a submission?

There is no prescribed form for a submission to a parliamentary committee. Submissions may be in the form of a letter, a short document or a substantial paper. They may include appendices and other supporting documents.

Submissions should be **relevant to the terms of reference** for the inquiry. They may address all or a selection of the points outlined in the terms of reference. Submissions may contain facts, opinions, arguments and recommendations for action.

It is helpful if submissions are prefaced by a brief summary of the main points.

How to lodge a submission

Submissions should be sent to the secretary of the relevant committee, Parliament House, Canberra ACT 2600. Individual committee addresses are available on the committee web pages (www.aph.gov.au/committee/committees_type.htm#house).

Submissions may be in hard copy (written or printed) form, or can be made by E-mail.

A written submission must be signed by the author either on his or her own behalf or on behalf of the organisation making the submission. Those signing on behalf of an organisation should indicate the level at which the submission has been authorised (eg President, Chief Executive, Secretary).

A return address for correspondence and a contact telephone number should be provided with each submission. Submissions forwarded by E-mail must

include the name, postal address and phone number of the person or organisation making the submission.

Submissions should be lodged by the advertised closing date. An extension of time, if required, can be requested from the committee secretary.

Where possible, hard copy submissions should be typed on A4 paper. This helps with reproduction of the submission. Where typing facilities are not available, hand written submissions are acceptable, but care should be taken to ensure that they are legible and suitable for photocopying.

It is helpful if an electronic version of a hard copy submission is provided on computer disk as well as in hard copy form. This assists committees to publish submissions on the Internet. The preferred electronic format is Word 97 or Portable Document Format (PDF, Adobe Acrobat Reader 5.0).

Publication of submissions

Once a submission is received by a committee, it cannot be withdrawn or altered without the committee's permission, nor can it be published or disclosed to any other person unless or until the committee has authorised its publication.

On receipt of a submission, a committee decides whether to accept the submission and authorise its publication. Copies of submissions authorised for publication may be requested from the committee secretariat and may be made available on the Committee's Internet site.

An author of a submission may ask that all or part of the submission should remain confidential. Any such request should be indicated clearly in the front of the submission. The committee will consider individual requests for confidentiality but retains the power to publish any submission.

Parliamentary privilege

The presentation or submission of a document to a committee is privileged. Essentially this means that a person is immune from legal action in respect of lodging the submission. If a committee authorises the publication of a submission its distribution also is immune from legal action.

Inquiry evidence

The evidence on which a parliamentary committee bases its findings includes the written submissions it receives and the oral evidence taken at hearings. Those making submissions may be asked to appear before the committee at a public or closed (in camera) hearing (see also Appearing as a witness at a parliamentary committee hearing—

<http://www.aph.gov.au/house/committee/documnts/witadv.htm>)

Inquiry process at a glance

The inquiry process may vary from inquiry to inquiry as circumstances demand but usually consists of the following steps:

1. Reference received/adopted by the committee.
2. Advertisements placed in relevant major newspapers, and submissions invited from individuals and organisations.
3. Submissions received and authorised for publication.
4. Committee conducts on-site inspections, background briefings and seminars (where appropriate).
5. Committee conducts public hearings with selected individuals and organisations requested to give oral evidence.
6. Committee considers evidence and prepares report.
7. The report is tabled in the Parliament and may be debated.
8. Copies of the report are sent to witnesses and persons who made submissions, distributed through Ausinfo bookshops, and are published on the Internet.
9. Government considers report.
10. Government responds to report.