
The Parliament of the Commonwealth of Australia

Modern-day usage of averments in customs prosecutions

House of Representatives
Standing Committee on Legal and Constitutional Affairs

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Foreword

When a government conducts a prosecution against a person, the operation of the law in determining the status of the evidence in the case is vital to the integrity and fairness of the proceedings. It is also important to the integrity of the judicial system as a whole. In the context of Customs prosecutions, the averment provisions in the *Customs Act 1901* are part of this crucial operation of the law.

Averment provisions have been a feature of the *Customs Act 1901* since its inception and although they do not reverse the onus of proof they allow statements of fact made by the prosecution to be taken as evidence of those facts unless the defendant produces evidence to the contrary. Averments are said to be necessary due to inherent problems in the gathering of evidence for Customs prosecutions.

The House of Representatives Standing Committee on Legal and Constitutional Affairs is pleased to have undertaken this inquiry. While averments are a technical legal mechanism in Customs prosecutions, they take place in the midst of the court process and are relevant to fundamental issues such as procedural fairness and equity between the parties. The Committee has considered these and other issues in this report and has made a number of recommendations regarding the use of averments. The Committee is hopeful that, in the context of Customs prosecutions, these recommendations will contribute towards improved prosecution practice and the continual refinement of the law as it relates to evidence and court procedure.

In the course of the inquiry the Committee considered the use of averments in a specific Customs prosecution, namely *Comptroller-General of Customs v Tomson and Keomalavong*. The Committee found the Australian Customs Service's handling of this case to be such as to warrant compensation for the defendant Tomson,

particularly in the fact that the investigation and prosecution ran over some 11 years. The Committee accepts that the Australian Customs Service has undergone considerable change since the time the case was conducted; the organisational culture of the Service is not the same today as it was then. However, the *Tomson* prosecution was a product of the same culture which was responsible for the Midford Paramount case, and the Committee believes it should be dealt with on a similar basis.

Hon Bronwyn Bishop MP
Chairman



Membership of the Committee

Chair Hon Bronwyn Bishop MP

Deputy Chair Mr John Murphy MP

Members Hon Julie Bishop MP
(until 07/11/03)

Hon Alexander Somlyay MP
(from 07/11/03)

Hon Alan Cadman MP

Hon Duncan Kerr MP

Mr Daryl Melham MP
(until 11/08/03)

Mr Robert McClelland MP
(from 11/08/03)

Ms Sophie Panopoulos MP

Hon Con Sciacca MP

Mr Patrick Secker MP

Dr Mal Washer MP

Committee Secretariat

Secretary	Ms Gillian Gould Ms Julia Thoener (acting from 29 March 2004 to 7 May 2004)
Inquiry Secretary	Ms Frances Gant (until July 2003) Dr Nicholas Horne (from September 2003)
Administrative Officer	Ms Frances Wilson



Terms of reference

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*.

The inquiry related specifically to the use of averment provisions as contained in the *Customs Act 1901*. The Committee examined cases that have relied on averment provisions in Australian Customs prosecutions.



List of abbreviations

ACS	Australian Customs Service
AGD	Commonwealth Attorney-General's Department
AGS	Australian Government Solicitor
ALRC	Australian Law Reform Commission
CBFCA	Customs Brokers & Forwarders Council of Australia Inc
CITC	Customs and International Transactions Committee, Business Law Section, Law Council of Australia
DPP	Commonwealth Director of Public Prosecutions
JCPA	Joint Committee of Public Accounts
SSCCALA	Senate Standing Committee on Constitutional and Legal Affairs



List of recommendations

2 The Appropriateness of the Averment Provisions

Recommendation 1 (paragraph 2.59)

The Committee recommends that the *Customs Act 1901* be amended so as to provide that, where evidence for a Customs prosecution is obtained, whether outside or inside the Australian jurisdiction, the evidence so obtained should be relied upon by the prosecutor/plaintiff and the averment provisions in the *Customs Act 1901*, except in exceptional circumstances, are not to be used in place of or as a substitute for that evidence.

Recommendation 2 (paragraph 2.66)

The Committee recommends that provisions be inserted into the *Customs Act 1901* establishing a process whereby directions hearings are to be held prior to the commencement of the trial in Customs prosecutions where averments form part of the prosecutor's/plaintiff's case. A number of submissions to the Committee discussed Report 60 of the Australian Law Reform Commission, and the Committee endorses certain components of the proposal in that Report relating to summary trial directions hearings. The provisions establishing the directions hearing process should also, as set out in Report 60, enable the court to make orders on a directions hearing, without limiting the orders that can be made, as to:

1. the just and efficient disposition of the proceeding, including orders for directions for the conduct of the proceeding;
2. the admissibility of evidence; and
3. the determination of a point of law.

The Committee also endorses the components of the proposal in Report 60 relating to disallowable averments, and further recommends that provisions be inserted into section 255 of the *Customs Act 1901* so as to provide, as set out in Report 60, that:

1. if it would be unjust to allow the prosecutor/plaintiff to rely on an averment, the court may, by order, on a directions hearing, disallow the averment;
2. without limiting the matters that the court is to take into account for the purposes of deciding whether or not to disallow an averment, the court is to take into account the following:
 - ⇒ whether the averment is of a matter that is merely formal or is not substantially in dispute;
 - ⇒ whether the prosecutor/plaintiff is in a position to adduce evidence of the matter and if the prosecutor/plaintiff 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;
 - ⇒ whether the defendant is reasonably able to obtain information or evidence about the matter; and
 - ⇒ what admissions, if any, the defendant has made in relation to the matter.
3. the prosecutor/plaintiff cannot rely on a disallowed averment.

Recommendation 3 (paragraph 2.71)

The Committee recommends that the Australian Customs Service's practice of referring briefs of evidence assembled towards possible Customs prosecutions to the Australian Government Solicitor for assessment and advice should be maintained.

Recommendation 4 (paragraph 2.73)

The Committee recommends that the Australian Customs Service, in consultation with relevant stakeholders, formulate guidelines for its staff on the appropriate use of the averment provisions in the *Customs Act 1901* in Customs prosecutions. The guidelines should:

1. clearly identify additional powers and improved techniques that are available to Customs officers when securing evidence;
2. state that only suitably trained delegates of the Chief Executive Officer of the Australian Customs Service should make averments;

3. state that the use of averments to establish formal and non-controversial matters or matters usually given judicial notice is appropriate;
4. clearly set out the limitations on the use of averments provided for in subsection 255(4) of the *Customs Act 1901*; and
5. clearly define the limitations on the use of averments identified by judicial authority.

The Committee further recommends that, to the greatest degree possible, the guidelines be inserted into the *Customs Regulations 1926* in accordance with Part XVI of the *Customs Act 1901*.

Recommendation 5 (paragraph 2.87)

The Committee recommends that the *Customs Act 1901* be amended to codify the recent determination of the High Court of Australia in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* that the applicable standard of proof in Customs prosecutions is the criminal standard of proof (beyond reasonable doubt).

3 The Use of the Averment Provisions in *Comptroller-General of Customs v Tomson and Keomalavong*

Recommendation 6 (paragraph 3.83)

Given the reprehensible handling exhibited by the Australian Customs Service over the course of the investigation and failed prosecution of Mr Tomson, the Committee recommends that Mr Tomson receive appropriate compensation for commercial losses directly attributable to the seizure of the goods and to the lapse of time before the resolution of the costs issue between the parties in 1998.

