HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO AVERMENT PROVISIONS IN AUSTRALIAN CUSTOMS LEGISLATION

AUSTRALIAN CUSTOMS SERVICE SUBMISSION

May 2003

Table of Contents

Overview of the Australian Customs Service

1. The Australian Customs Service (Customs) was established in its present form on 10 June 1985 by sub-section 4(1) of the *Customs Administration Act 1985*.

2. Its principal task is to manage the security and integrity of Australia's borders. It works closely with other government and international agencies, in particular the Australian Federal Police (AFP), the Australian Quarantine and Inspection Service, the Department of Immigration and Multicultural and Indigenous Affairs and the Department of Defence, to detect and deter the unlawful movement of goods and people across the border.

3. The agency is a national organisation presently employing around 4,800 people in Australia and overseas, with its Central Office in Canberra. It has a fleet of ocean-going patrol vessels and contracts two aerial surveillance providers for civil maritime surveillance and response.

4. Customs plays an important role in the Government's response to terrorist threats. Protecting the Australian community through the interception of illegal drugs and firearms is also a high priority and sophisticated techniques are used to target high-risk aircraft, vessels, cargo, postal items and travellers. This includes intelligence analysis, computer-based analysis, detector dogs and various other technologies.

5. Customs has three main roles:

- to facilitate trade and the movement of people across the Australian border while protecting the community and maintaining appropriate compliance with Australian law;
- to efficiently collect customs revenue; and
- to administer specific industry schemes and trade measures.

6. Customs also administers legislation on behalf of other government agencies, in relation to the movement of goods and people across the Australian border.

Customs enforcement and regulatory philosophy

7. Customs operates in a self-assessment environment and must be able to assume that the information provided to it is correct. Underpinning this self-assessment environment are risk management strategies to identify cargo and passengers most likely to require further attention. This risk-based approach ensures minimal disruption to the flow of legitimate trade and travel across the border.

8. Throughout the 1990s Customs refined its risk management approach, culminating in 2001 with the clear articulation of its Regulatory Philosophy. This doctrine describes the variety of ways Customs regulates and responds to compliant and non-compliant behaviour.

9. The Customs Compliance Continuum (refer Appendix A) is a visual representation of the way Customs applies its regulatory philosophy across the spectrum of regulation. The aim of this compliance continuum is to create a balance between service, facilitation and enforcement activities. Customs continues to have a direct interest in improving levels of compliance and fostering an environment of co-operation with clients.

10. When international traders and travellers are compliant with the laws and regulations administered by Customs, intervention is minimised. The nature of our operational work is governed by the behaviour of our clients and the risks they or their cargo represent.

11. Our risk identification and analysis is continuous – pre-arrival, at arrival and post clearance – and our response is based on the level of risk. In order to make accurate risk judgements we continually monitor our business environment. Our audit activity is undertaken in response to identified client or cargo risk. It is directed across the entire Customs client base and is generated from, and feeds back into, the risk identification and analysis cycle.

12. Resource intensive interventions such as comprehensive audits and cargo searches are undertaken in response to identified high risks. Our response to non-compliant activity is determined by the extent and nature of the non-compliance and is in line with the sanctions set out in the law. The Customs Compliance Continuum illustrates the application of this philosophy.

Origins of averments in Customs legislation

13. The genesis of averment provisions is found in nineteenth century Customs and Revenue Acts of England.

14. From the commencement of the *Customs Act 1901* (the Act), section 255 made provision for averments. However, from its first enactment, section 255 did not extend averments for use in proving intent nor did it apply to proceedings for an indictable offence or an offence punishable directly by imprisonment.[1]

[1] *Review of Commonwealth Criminal Law*, Final Report (Canberra: AGPS, December 1991) or Gibbs Committee para 9.5

15. Dr H.N.P. Wollaston, the first permanent head of the Department of Trade and Customs, in his commentary on Australian Customs law, recognised as early as 1904 the need for averments:

> *"This is a most important provision, and though not by any means novel in Customs Acts, has been as much commented upon as if it were something altogether new and unprecedented. It is a very necessary provision, inasmuch as in many instances whilst there could not be the slightest moral doubt that the offender was guilty, yet it would be next to impossible to actually prove it by direct evidence".*[2]

16. Although Wollaston referred to "moral doubt" which is not a concept recognised in modern jurisprudence, the need for averments as documented by Wollaston remains - namely the peculiar difficulties of proving Customs offences.

17. Since enactment, section 255 has been amended only once. This provision has remained unchanged since 1923.

The scope and use of averments in Customs prosecutions

What is an averment?

18. An averment is an allegation of fact in a pleading, which by operation of law, is *prima facie* evidence of the fact averred. It is therefore a type of evidentiary aid available in particular legislative contexts. Other types of evidentiary aids include provisions that make *prima facie* evidence of the content of certificates relating to information on registers and drug analysis.

19. Section 255 of the Act is the statutory provision giving an averment this effect. Section 255 is one of a number of examples of averment provisions in Commonwealth legislation. They are commonly found in regulatory and revenue legislation.

20. The effect of section 255 is that it makes the allegation of a fact *prima facie* evidence only - it does not reverse the onus of proof in relation to that fact. Certain other averment provisions do reverse the onus of proof as did the predecessor to the current section 255. Section 255 does not affect the standard of proof.

[2] Wollaston, H.N.P., *Customs Law and Regulations* [Sydney: William Brooks & Co., 1904] page 169

The reasons for averments

21. The principal legislative policy reason for the use of averments in Customs prosecutions[3] is that they assist the enforcement of the objects of the Act, the most important of which is protection of the revenue. The use of averments in matters investigated by Customs is limited to Customs prosecutions as defined, being proceedings for the recovery of pecuniary penalties and condemnation of forfeited goods. They are also used by Customs in certain debt recovery proceedings. See Appendix B for a list of some of the main Customs prosecutions and their penalties.

22. Averments cannot be used for cases investigated by Customs to be referred for prosecution under the Criminal Code.

23. It was apparent to the Parliament at Federation that successful enforcement of the revenue protection objective of the Act could be enhanced by means of Customs prosecutions. Customs prosecutions were provided for in Part XIV of the Act, of which the averment provision in section 255 is part.

24. Of the use of averments in section 255 (as it then was), Justice Higgins of the High Court said, shortly after Federation in the case of *Baxter v Ah Way* (1909) 10 CLR 212 at 216,

> *"In my opinion, section 255 was meant to throw the burden of proof on the defendant in Customs cases of disproving the charge. In all Customs Acts, such provisions, apparently subversive of the first principles of justice, are to be found. Experience has shown them to be necessary in consequence of the peculiar difficulties of proving offences against the Customs."*

25. The first sentence of the above quotation, refers to the averment provision in its original form - it is now well established (see below) that in its present form the effect of the averment is to establish a fact to a *prima facie* level only and does not shift the burden of proof.

26. As to what these peculiar difficulties were, Justice O'Connor of the High Court said in *The King v Lyon* (1906) 3 CLR 770:

> *"Now, one objection that was put very strongly by Mr Gordon, and which at first impressed me a great deal was this, that, as the making of an incorrect statement under section 144 is punishable by severe penalties, the legislature could not have*

[3] Refer section 244 of the *Customs Act 1901* for the meaning of Customs prosecution

> *intended that the Act should compel an importer to make such a difficult estimate, in which case he might very easily make a mistake, and then provide a heavy penalty for the making of any mistake. But the answer to that is this, that it is one of the underlying principles of the Act that the Government should rely upon the importer to honestly state the truth, according to his knowledge,* ***in reference to a matter of which he knows everything and the customs know nothing.***" [Emphasis supplied]

27. The High Court per Dixon J. (as he then was) said in *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 of an averment provision in the Crimes Act - being similar to the present section 255 of the Act:

> *"It is to be noticed that this provision, which occurs in a carefully drawn section, does not place upon the accused the onus of disproving the facts upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus."*

28. As New South Wales Justice Owen said of the identical averment to section 255 in the Excise Act in *Ex parte Healy* (1903) 3 SR (NSW) 14:

> *"The view I take of s144 is simply this, that it relieves the Crown from the necessity of proving their case in the first instance by oral evidence.....But when the information has been put in, and all the evidence produced is before the tribunal, then it appears to me that the tribunal has to determine upon the whole of the evidence before it, whether the Crown has established the guilt of the accused or not."*

The use of averments and matters commonly averred

29. The condition precedent to a typical Customs investigation is the arrival of goods from abroad. Inevitably, most everything to do with the purchase and transport of goods from abroad will have a foreign component. Unlike purely domestic crime, evidence of all those components will rarely be readily available - the negotiations may take place overseas, contracts may be signed there, the payment will be received there, and sometimes made there, and witnesses to the truth of these matters and the documents which support them will often be located there.

30. Accordingly, matters that are commonly averred are that:

- goods were brought into Australia from another country;
- they are owned or were purchased by a particular defendant;
- the defendant arranged their purchase with a certain person or company abroad;
- he or she reached that agreement in a particular country;
- the goods comprised material with a particular physical structure or were goods of a particular description;
- they arrived on a given day by particular means;
- they were transported from one particular place to another;
- the defendant was present when they were unpacked;
- the defendant engaged a given broker to lodge relevant documentation; and
- the given price of the goods, or their description, was wrong and that it was the defendant who provided those erroneous details.

31. In a Customs prosecution it is permissible to aver matters of mixed law and fact.[4] Examples of averments of mixed law and fact are: that the defendant imported goods; that the defendant and his broker were in a principal/agent relationship; that the goods were properly classifiable to a particular tariff item, or the rate of duty for that item was a particular percentage of customs value.

32. In a Customs prosecution, the plaintiff would also not directly aver matters that are evidence rather than a mere factual conclusion. For instance, the name of the driver who moved the goods from a wharf, the number of his truck, the fact that a particular witness saw the defendant unpack the goods, or that the defendant had a conversation with an officer or made particular admissions.

33. The Australian Law Reform Commission (ALRC), in its Report No.s 60[5] and 95,[6] recommended that averments be retained with minor changes that would formalise judicial discretions in relation to them. The ALRC also adverted to many of the reasons discussed above why averments are needed.[7] In that report, at paragraphs 13.44 and following is a summary of the particular utility of averments. The necessity for averments arises where the prosecutor is not in a position to adduce evidence because it is from overseas and witnesses have to be willing to leave their homeland to testify, or because the obtaining of it would result in undue cost or delay. The

[4] See section 255(2)(b) which has the effect of making such an averment *prima facie* evidence of the fact only

[5] *ALRC Report No. 60:Customs and Excise* (Sydney: ALRC, April 1992)

[6] *ALRC Report No. 95:Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Sydney: ALRC, December 2002)

[7] See paragraphs 12.7 and 12.8 of ALRC 60 for an extended discussion

latter, for instance, might occur in every case where goods are shipped, and statements are required from the owners of shipping lines and the captains of container vessels who land goods and return to international waters for extended periods, from stevedores and warehousemen, from every wharf, depot, freight and trucking operator involved.

34. The proliferation of illicit importations via international post now exacerbates the difficulties of proof to which the ALRC adverted in respect of air and sea cargo and personal passenger importation. Those availing themselves of the postal method of importing to circumvent barrier controls recognise that, in doing so, they do not risk being intercepted in person or leaving a ready documentary trail linking them to their importations. They do not engage customs brokers, arrange delivery or sign documents.

The role of the Australian Government Solicitor (AGS) in drafting averments for Customs

35. Briefs of evidence are forwarded by Customs to AGS for consideration prior to any charges being laid. AGS' task is to provide legal advice on the case including the adequacy of evidence and procedures to be undertaken. Subject to AGS advice on whether there exist reasonable prospects of success, and in accord with the *Prosecution Policy of the Commonwealth*, the Customs delegate will make a decision. A judgement about the prospects of conviction is based on the evidence in the brief and having regard to the applicable standard of proof.

36. In so advising, AGS considers the evidence in detail. In that deliberation, AGS would be cognizant, from long exposure to these matters, of the difficulties or costs of procuring certain evidence particularly the attendance of overseas or transient witnesses, which has been adverted to above and by the ALRC. In doing so, the AGS is aware of the availability of averments under section 255 and considers to what extent averments might be used to adduce relevant *prima facie* evidence of those matters which are difficult of proof.

37. In considering whether - and what - averments Customs might make in that regard, AGS does not go beyond the evidence in the brief. It does not allege matters for which there is no factual basis among the materials provided by Customs.

38. Having said that, it is not necessary to have admissible evidence of every matter that Customs avers. There would be no need for averments if that were the expectation. However matters are not

averred if there is not some reliable information in the brief to support the existence of the factual conclusions that the averments assert.

39. In 1992, the Attorney-General's Department promulgated Legal Services Instruction No 1 of 1992 relating to the policy that should apply thereafter to the use of averments. This Instruction conforms to ALRC 60's conclusion as to the way in which averments are to be used by prosecutors. A copy of this instruction is located at Appendix C.

40. This Instruction (which is no longer in force) allowed averments to be used to prove any issue on which it could reasonably be believed there would be no argument if oral evidence had been able to be called about it. This would cover most of the transport and movement details of goods to, and within, Australia. It also permitted averments to be included about any matter peculiarly within the knowledge of the defendant if it was *'difficult or costly'* for the prosecutor to lead that evidence. The principles enunciated in that Instruction are still relevant to the drafting of averments today.

41. Apart from Customs prosecutions, which directly concern offences under the Act, averments are used in the following situations:

- Section 35A Debt Recovery Proceedings: This provision of the Act allows proceedings for the recovery of duty in relation to customable goods that are not properly accounted for. Subsection 35A(3) allows the use of averments in those debt recovery proceedings and therefore section 255 impacts on the conduct of such proceedings.

- Proceedings for the condemnation of ships, aircraft or goods – Section 244: Averments can also be used in proceedings for the condemnation of goods. Such proceedings are commonly commenced by Customs in relation to prohibited imports such as firearms and child pornography.

Averments and the nature of Customs prosecutions

42. The nature of Customs prosecutions, whether they are criminal, civil or hybrid proceedings, is a matter presently under consideration by the High Court in the case of *CEO of Customs v Labrador Liquor Wholesale Pty Ltd & ors*. The High Court heard this matter on 11 December 2002 and the result is still reserved as at this date.

43. The complexity of Customs prosecutions results from many years of statutory amendments, judicial interpretation and administrative practices. Whether they are regarded as civil or

criminal, or even unique, also depends on the particular statutory context in which the question is asked.

44. Customs notes that since Federation, there have been jurisdictional differences in relation to the relevant rules of evidence and the appropriate standard of proof. In this regard, Customs is awaiting direction from the High Court in the Labrador Liquor case on the relevant standard of proof and which rules of evidence apply although that decision will not necessarily remove difficult questions of statutory construction.

Reviews and recommendations of the ALRC regarding averments

45. In January 2000, the Attorney General referred to the ALRC a far ranging examination of the application of civil and administrative penalties in the Commonwealth jurisdiction. The review was to have regard to a range of issues,[8] including:

- the recommendations of the ALRC Report No.60 (Customs and Excise); and

- the remarks of the High Court in *Comptroller of Customs v. D'Aquino Bros Pty Limited* (30 September 1996) and the New South Wales Court of Appeal in *Comptroller-General of Customs v. D'Aquino Bros Pty Limited* (19 February 1996).

46. In a subsequent Discussion Paper No. 65: *Securing Compliance: Civil & Administrative Penalties in Australian Federal Regulation* (Sydney: ALRC, April 2002) the ALRC commented upon the nature and scope of Customs prosecutions under Part XIV of the Act. Further comment arose in its final report, *ALRC Report No. 95: Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Sydney: ALRC, December 2002)[9] acknowledging that Customs prosecutions are of a unique form in Australian legislation[10] partly due to historical reasons.

47. The Discussion Paper referred to the procedure applicable in superior or intermediate courts (s.247) and also of summary jurisdiction (s.248), but did not examine the question of averments. Further, the subject is not addressed in the list of distinctions between civil and criminal noted by the Commission.[11]

---

[8] ALRC Discussion Paper No. 65: *Securing Compliance: Civil & Administrative Penalties in Australian Federal Regulation* (Sydney: ALRC, April 2002) at p.7-10.

[9] *ALRC Report No. 95:Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Sydney: ALRC, December 2002) at p.467-485 (Chapter 13).

[10] ALRC DP65 at para 3.101; ALRC Report No.95 para 13.3.

[11] ALRC DP65 at para 3.105.

48. The issue of averments appears to have arisen later as a consequence of the further consideration of *ALRC Report No.60: Customs and Excise* (Sydney, ALRC, 1992). This contained recommendations with a direct bearing on averments.

49. The ALRC Discussion Paper No. 65 proposed[12] an amendment to the Customs Act (in line with a previous report, ALRC Report No.60) that Customs prosecution procedures be made criminal or alternatively to amend so that there is "*..a clear legislative statement about whether Customs proceedings are civil or criminal.*" This proposal was extended further in the final report (ALRC95), which recommended:[13]

> ***Recommendation 13-1****. The Customs Act 1901 (Cth) and the Excise Act 1901 (Cth) should be amended to:*
>
> *(a) remove the concept of a Customs or excise prosecution;*
> *(b) classify each relevant offence as either criminal or civil by clear legislative statement and allow the ordinary rules of procedure and evidence for that type of breach to apply; and*
> *(c) specify in relation to each criminal offence whether averments are to be permitted.*
>
> ***Recommended 13-2.*** *As recommended in the ALRC's report, Customs and Excise (ALRC 60, 1992), averments may be disallowed in any proceedings by the court if it is of the view that they would be unfair to the accused.*
>
> ***Recommendation 13-3.*** *The Customs Act 1901 (Cth) and the Excise Act 1901 (Cth) should be amended to bring about consistency in the prosecution of minor and more serious breaches so that one class of procedure, either criminal or civil, is used regardless of whether proceedings are brought in a summary or higher court, and irrespective of the jurisdiction within which the proceedings are brought.*

50. Customs has consistently maintained that Customs prosecutions, as defined at s.244 of the Act, are civil or quasi-criminal proceedings. This view is based on considerable historical precedent.

---

[12] ALRC DP65 at p.30 (Proposal 17-7 and 17-8). Note that in the Customs Submission to the ALRC (October 2002) regarding Discussion Paper Proposal 17-7 which suggested that Customs prosecutions should be criminal, Customs responded: "*While Customs agrees with the ALRC's opinion that there needs to be greater consistency on this issue, Customs does not consider that all offences in the Customs Act should be characterised as criminal. Customs considers that making all Customs offences criminal in nature could harshly affect those prosecuted – for example, through the greater stigma and consequences of being found guilty for a criminal offence which is effectively regulatory in nature. In such circumstances Customs might find itself less inclined to prosecute those offences that are purely regulatory in nature, such as for late or inaccurate cargo reporting, or moving goods without Customs authority, for fear that punishment on conviction might not, or might not seem to, fit the crime. Having said that, Customs recognises that this can happen now in courts of summary jurisdiction, where the criminal standard applies to the less serious offences.*"

[13] ALRC Report No. 95 at p.37.

It was the approach taken in relation to the High Court and the NSW Court of Appeal in *Comptroller of Customs v. D'Aquino Bros Pty Limited*,[14] which broadly upheld that in all the circumstances a civil standard of proof applied to Customs prosecutions.

51. These cases are reviewed by the ALRC in its report [15] together with options for reform from an earlier discussion paper[16] and report.

52. Customs recognises that there has been uncertainty in relation to the character of Customs prosecutions and this is before the High Court in Labrador (as mentioned above).

53. Customs is under an obligation to protect the revenue and ensure that it has an ability to conduct its enforcement policy as effectively as possible. Ultimately, this means that Customs must pursue mechanisms that are fair and reasonable to the defendant, but also meet the practicalities of investigating and gathering evidence for its presentation to the court.

54. Mechanisms that increase the likelihood of technical objections in court or which could increase costs or generate delays in meeting evidential requirements would not be in the interest of the Commonwealth. Such mechanisms could add significantly to the public cost of investigating and prosecuting offences.

55. The Government is examining and has yet to settle its position on the recommendations contained in ALRC Report No. 95, so a final position cannot yet be adopted by Customs.

<u>The use of averments and the ALRC reports</u>

56. The ALRC states that averments are:

> "*a substantial qualification to the fundamental principle that in criminal prosecutions the onus should lie on the prosecution*."[17]

57. However, it is clear that averments do not alter the obligation on the prosecution to prove its case, and averments at most should only cast an evidential burden on the defendant in relation to non-essential matters. Further, the ALRC previously stated that judicial authority has settled that averments do not reverse the onus of proof.[18]

---

[14] (1996) 135 ALR 649; [1996] 17 Leg Rep C8A

[15] ALRC Report No. 95 at p.471-475

[16] *ALRC Discussion Paper No.42: Customs and Excise: Customs Prosecutions, Jurisdiction and Administrative Penalties* (ALRC, 1990); ALRC Report No.60 (1992) Op.cit.

[17] ALRC Report No.95 at para 13.47

[18] ALRC Report No.60 Vol II para 12.4

58. The ALRC acknowledged that averments are often used for proving formal and non-controversial matters and mentioned examples of the date of arrival of a ship, the rate of exchange of a foreign currency or the authority of the informant to commence prosecutions.[19] In addition, they can be used on matters of fact to which judicial notice would ordinary be given. For example, a carton of cigarettes wrapped and labelled in the ordinary way may be averred to be a carton of cigarettes; that the number of packets mentioned on the carton as being inside is the actual number of packets etc; that the content of the cigarettes is tobacco where nothing else is alleged. If these issues were not averred, it is possible that each aspect could become an issue of technical objection otherwise requiring Customs to present evidence on every factual issue.

59. Given the number of steps involved in proving a transaction involving an importation or exportation there is, in the absence of averments, considerable opportunity for a defendant to raise technical objections. The availability of averments minimises the risk of this occurring by:[20]

- Providing a means for avoiding debate over formal matters where there is no real dispute;

- Avoiding the need to investigate matters beyond what is reasonable and necessary for proving the offence; and

- Avoiding the need to prove matters which are peculiarly within the knowledge of the defendant and of which the prosecution is not completely aware.

60. There are limits at common law[21] on the use of averments. The ALRC has previously acknowledged that there is considerable judicial authority in this area[22] and that there is substantial support for the retention of averments.[23]

61. The ALRC has referred to the caution expressed by the courts "*in requiring them* [averments] *to be drawn with care and precision*" and remaining "*sensitive to the possibility of injustice arising from their use*". Clearly there exists judicial scrutiny of averments avoiding potential abuses. Customs would not wish that scrutiny to be reduced or impeded.

---

[19] ALRC Report No.95 at para 13.44; and see para 13.47

[20] See also ALRC No.95 at para 13.48

[21] ALRC Report No.95 at para 13.45 cites that it is not permissible to aver assertions of guilt; irrelevant facts; opinions; interpretations of documents available in court nor (para 13.46) to aver intent.

[22] ALRC Report No.60 Vol II para 12.4

[23] ALRC Report No.60 Vol II para 12.5

62. Customs also notes that:

- The ALRC in its earlier report did not favour a codified legislative approach setting out precisely what averments may or may not be allowed as it considered that this might be arbitrary and may not meet the needs of a given case. It favoured leaving decisions to a court pre-trial stage (such a directions hearing[24]) and assisted by guidelines.

- The ALRC noted[25] that section 255 of the Customs Act conformed in certain respects with the requirements "*for averments on all matters, whether revenue or non-revenue which the Gibbs Committee[26] thought desirable*." For example that averments should not be available where an offence is punishable by imprisonment or to prove intent.

- The ALRC favoured placing an interpretative note in averment provisions setting out certain case authorities that would limit the averment provision. They suggested it should also provide a statement, which permits disallowance if a court was of the view that it was unjust to the defendant. It gave four factors which a court might take into account in deciding whether to disallow the averment:[27]

    i. Whether the averment relates to a matter that is merely formal and is not substantially in dispute.
    ii. Whether the prosecutor is in a position to adduce evidence and if not whether the difficulty derives from overseas or the obtaining of the evidence would result in undue cost or delay.
    iii. Whether the defendant is reasonably able to obtain information or evidence about the matter; and
    iv. What admissions the defendant has made.

Potential impact of repealing section 255 (or if its effectiveness is reduced)

63. There would be an additional burden of gathering evidence on minor matters including matters that may commonly be regarded as public knowledge e.g. that a cigarette contains tobacco. This becomes very expensive and adds to delay in proceedings. Challenges to minor

[24] ALRC Report No. 60 Vol II para 12.11. Note that this would have required a directions hearing for a summary proceeding under the proposed ALRC scheme. See clauses 487 and 489 in the ALRC draft Bill (ALRC Report No. 60 Vol.III p.278-280.

[25] ALRC Report No.60 Vol II para 12.12.

[26] *Review of Commonwealth Criminal Law*, Final Report (Canberra: AGPS, December 1991) or Gibbs Committee para 9.7-9.8.

[27] ALRC Report No.60 Vol II para 12.12. The averment provision in the ALRC scheme was clause 487 in its draft Bill (see ALRC 60 Vol.III).

points of evidence may make the matter uneconomic to proceed and undermine the enforcement process.

64. Repeal of the averment provisions might make it more difficult for Customs to prove its case given the peculiar nature of the Customs environment. Much of the evidence may be in the possession or control of persons in other jurisdictions and not available to investigators.

65. In the light of self-assessment policies that are in place benefiting the trading community Customs is dependant on the honesty of its clients. An ability to properly enforce through administrative penalties or prosecution in serious cases is crucial to the success of self-assessment.

66. The legal and policy requirements for the conduct of prosecutions and the duties of the prosecuting agency effectively mean that there is an obligation for complete disclosure of the prosecution case. Safeguards against the misuse of averments are greater than they have ever been.

67. These are all factors that lead to

- Increased cost of the investigation (evidence gathering),
- Increased cost of prosecution,
- The potential increase in the use of other sanctions to alleviate the additional costs associated with the enforcement, and
- A potential reduction in prosecutions where it is anticipated that the cost and delay would be excessive. This would flow from adherence to the financial considerations contained within the *Prosecution Policy of the Commonwealth*.

Averments in other legislation

Commonwealth revenue legislation

68. Averment provisions, and provisions assisting the relevant enforcement agency either by reversing the onus of proof or by providing for a certificate to be *prima facie* evidence of the matters dealt with in the certificate are reasonably common in Commonwealth legislation. These provisions vary widely in terms of their potential impact on persons whose activities are covered by the particular law. Examples are included in Appendix D and include s.86DA of the *Quarantine Act 1908*, which provides that a certificate, which has been issued by an analyst appointed under the Act, can be *prima facie* evidence of such things as the results of the analysis of a substance.

69. Such a certificate can be used in prosecutions for criminal offences against the Act, which carry quite serious penalties.[28] Against this must be balanced the fact that while a wide variety of facts that can be included the certificate, they are specified in some detail, and this may be contrasted with the averment provisions in the *Customs Act 1901* and the *Excise Act 1901* where there is no restriction on the factual matters that may be averred.

70. An example of a provision that reverses the onus of proof is s.30AA of the Crimes Act where the burden of showing cause why an organisation should not be declared unlawful falls on the members of the association once a summons, which may include averments, has been issued under that section.

71. The most relevant comparisons with section 255 of the Act are the evidentiary provisions in other Commonwealth revenue legislation, notably the *Excise Act 1901, Taxation Administration Act 1953* and the *Payroll Tax Assessment Act 1941*. It is also useful to consider some averment provisions in other Commonwealth legislation, and to briefly consider the approach taken in Canadian, New Zealand and United Kingdom legislation. These are discussed below.

Excise Act

72. Section 144 of the Excise Act is effectively in the same terms as section 255 of the Act. The nature of the offences and the penalties are also comparable. For example, the penalty for evading Customs duty is not less than 2 times the amount of duty that would have been evaded, and not more than 5 times the amount of that duty or $50,000.[29] Evasion of duty under the Excise Act attracts a similar penalty.[30] The penalties for other serious Customs prosecutions are more or less comparable. For example, the penalty for smuggling is a maximum of 5 times the amount of duty that would have been payable, or if this cannot be determined, a maximum penalty of $100,000. The penalty for importing prohibited imports is a maximum penalty of 3 times the value of the goods, or $100,000.

Taxation Administration Act

73. Section 8ZL of the Taxation Administration Act permits statements of fact or averments in an information, statement of claim or complaint for a 'prescribed taxation offence' to be *prima facie*

[28] For example, the maximum penalty for illegal importation is imprisonment for 10 years - see s.67

[29] See s.234(2) of the *Customs Act 1901*

[30] See s.120(2) of the *Excise Act 1901*

evidence. There are no express restrictions as to the factual matters that may be averred. Among other things a prescribed taxation offence is a taxation offence committed by a natural person that is punishable by a fine and not imprisonment, or an offence committed by a body corporate.[31] Maximum fines for such offences appear to be about $4,000.[32] For some offences, the court may also order the person to pay an amount between 2 and 3 times the amount of tax avoided.[33] You should note that persons might be convicted of prescribed taxation offences in absentia.[34]

Payroll Tax Assessment Act

74. The Payroll Tax Assessment Act also has a very wide averment provision. Section 59 provides that in any taxation prosecution (under that Act) the information, complaint, declaration or claim shall be *prima facie* evidence of the matters or the matters averred. The maximum penalty for avoiding pay roll tax is $1,000 and treble the amount of tax avoided (s.45).

Commonwealth non-revenue legislation

75. There are a number of Commonwealth laws that permit averments to be used, or allow certificates to be issued which become *prima facie* evidence of the matters set out in the certificate. Section s.86DA of the *Quarantine Act 1908* is discussed above. Another example is s.166 in the *Fisheries Management Act 1991*. Under that section, a prosecutor may aver that the defendant was in a particular place at the time of the alleged offence, that a boat or aircraft was at a particular place at that time, and that fishing being engaged in from the boat was commercial fishing. The Australian Fisheries Management Authority may issue a certificate in relation to certain other factual matters. Penalties for offences against this Act are 500 penalty units,[35] although 12 months imprisonment is a punishment for an offence against s.98.[36]

State and Territory legislation

76. Customs notes that there are numerous examples of averment provisions in State and Territory laws.

---

[31] See s.8A of the *Taxation Administration Act 1953*

[32] See for example, s.8E of the *Taxation Administration Act 1953*

[33] See s.8HA of the *Taxation Administration Act 1953*

[34] See s.11 of the *Taxation Administration Act 1953*

[35] See s.95

[36] Please note s.13.6 of the Criminal Code, which is applied to the Fisheries Act by s.6A of that Act, would prevent an averment, but not a certificate, from being used in a prosecution for the latter offence

Foreign Customs legislation

Canada

77. Section 152 of the *Customs Act 1985* (Canada) provides that in any proceedings under that Act relating to the importation or exportation of goods, the burden of proof of the importation or exportation of the goods lies on 'Her Majesty'. Proof of the foreign origin of goods is proof of the importation of the goods. However, where the Crown establishes that the facts or circumstances are within the knowledge of the accused or are or were within the accused's means to know, the burden of proof in relation to the identity or origin of goods, the manner time or place of importation or exportation of any goods, the payment of duty, and the compliance with any of the provisions of the Act or the regulations in respect of any goods is placed on the defendant (s.153(3) and (4)).

78. Also of interest is s.151 the Canadian Customs Act. That section provides that in any proceeding under that Act, the production or proof of the existence of more than one document made or sent by or on behalf of the same person in which the same goods are mentioned as bearing different prices or given different names or descriptions is, in the absence of evidence to the contrary, proof that any such document was intended to be used to evade compliance with the Act or the payment of duties under the Act.

79. The prosecution can have the assistance of these provisions in relation to offences that have quite serious consequences. For example, the penalty for evading duty, making a false statement or smuggling[37] are punishable by a fine of $50,000 or 6 months imprisonment upon summary conviction, and upon indictment, a fine of $500,000 or maximum of 5 years imprisonment.[38]

New Zealand

80. Section 239 of the New Zealand *Customs and Excise Act 1996* provides that every allegation made by the Crown in a statement of claim or information (other than in proceedings for an indictable offence) about the value of goods, country or time of exportation of goods, the fact or time of importation, the payment of duty, and the place of manufacture of goods, (among other things) shall be presumed to be true unless the contrary is proved. This provision extends to proceedings in which the existence of intent to defraud the

[37] See ss.153 and 159

[38] See ss.160 and 163

revenue of the Customs is in issue (s.239(3)). Nevertheless, in any proceeding for an offence where it is alleged that the defendant intended to commit the offence, the prosecution has the burden of proving that intent beyond reasonable doubt.

81. Section 220 of the New Zealand Customs and Excise Act provides that unless otherwise specified, every offence against the Act is punishable on summary conviction. The above provision would apply to some offences which have significant penalties. For example, the offence of defrauding the revenue (s.211) seems to be one that is punishable on summary conviction, since it is not specified to be an indictable offence. The maximum penalty for defrauding the revenue is imprisonment for 6 months, or a fine not exceeding $10,000 or both. The subject matter which may be presumed to be true in the NZ Customs Act is narrower than the matters which may be averred under the Australian Customs Act, but the consequences under the New Zealand Act are more serious, in that they include imprisonment.

United Kingdom

82. Section 159(1) of the *Customs and Excise Management Act 1979* (UK) provides that an averment may be made in any process in proceedings under Customs and Excise Acts in relation to: the Commissioners have or have not been satisfied as to any matter of which they must be satisfied, that any ship is a British ship, or that any goods thrown overboard, stave or destroyed were so dealt with in order to prevent or avoid the seizure of the goods. The averment is, until the contrary is proved, sufficient evidence of the matter in question.

83. Further, s.159(2) of the above Act provides for the reversal of the burden of proof in relation to certain matters such as payment of duty, lawful importation, whether goods were subject to a lawful restriction on their importation or exportation, then the burden of proof is upon the non-crown party.

United States of America

84. There are apparently no averment provisions in the Customs Title of the United States Code (the US Code). Nor are there provisions that reverse the burden of proof in relation to all offences against Customs laws. Rather, the approach taken by the US Code is to enact individually crafted evidential provisions, some of which apply to offences that have serious consequences, including imprisonment, for offenders.

85. For example, an offence which has a specific provision to aid the prosecution is Title 18, s.545 of the US Code. That provision prohibits smuggling. In a prosecution for this offence, proof of a defendant's possession of smuggled goods, unless explained to the satisfaction of the jury, is sufficient evidence to convict a person of smuggling. The penalty is a fine or imprisonment for not more than 5 years.

86. There is also an offence of aviation smuggling.[39] Under that provision the evidence of certain facts, such as operating an aircraft without lights when lights are required to be displayed, an auxiliary fuel tank not fitted in accordance with applicable law, or the failure to correctly identify the aircraft (among other things) within 250 miles of the US territorial sea is *prima facie* evidence that the transportation of the merchandise on the plane was unlawful and establishes a presumption that the purpose of the transfer is to make it possible for such merchandise to be introduced into the United States unlawfully. The civil penalty is a maximum of $10,000. An intentional violation is punishable, in addition to the civil penalty, by a penalty of $10,000 and 5 years imprisonment if the substance was not a controlled substance, and $250,000 and 10 years imprisonment if the substance is a controlled substance. In addition the aircraft is liable to forfeiture in accordance with Customs laws.

87. The US Code also has an offence of entering merchandise into the commerce of the United States by means of a materially false document.[40] There are 3 degrees of culpability - namely fraud, gross negligence, or negligence. For the first two offences the burden of proof is on the prosecutor, but for negligence, the prosecutor must prove the act or omission, and the defendant must prove that the act or omission was not negligent. The maximum penalty for negligence is a civil penalty in an amount not to exceed the lesser of the domestic value of the merchandise, or 2 times the lawful duties, taxes, and fees of which the government may be deprived. If the violation does not affect the assessment of duties, the penalty is 20% of the value of the merchandise.

88. In actions for the forfeiture of goods or vessels (among other things), there are certain rules of proof that assist the government.[41] These rules are that -

> (a) the testimony or deposition of the customs officer who boarded (among other things) a vessel or aircraft, or has arrested a person, shall be *prima facie* evidence of the place where the act in question occurred.

[39] Title 19, s.1590 of the US Code

[40] Title 19, s.1592 of the US Code

[41] See Title 19, s.1615 of the US Code

(b) Marks, labels, brands, or stamps, indicative of foreign origin, are *prima facie* evidence of the foreign origin of such merchandise.

(c) The fact that a vessel is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication shall be *prima facie* evidence that the vessel in question has visited such hovering vessel.

89. Title 19, s.1703 of the US Code provides for the seizure and forfeiture of vessels involved in defrauding the revenue involving smuggling. For the purposes of that section, the fact that a vessel has become subject to pursuit, or is a hovering vessel, or that it fails to display lights as required by law, shall be *prima facie* evidence that it is being, or has been, employed to defraud the revenue of the United States.

90. Please refer to Appendix E for extracts of the foreign legislation (excluding the US Code).

Conclusion

91. Customs ability to maintain an effective self-assessment policy to minimise intervention and to foster cooperation with its clients depends upon an effective deterrent regime. Averments are part of maintaining efficient prosecutions in Customs' particular environment.

92. Customs gathers evidence and formally initiates a Customs prosecution, but relies on its legal advisers to determine whether a particular matter should be averred. This advice at an early stage provides Customs with some reasonable certainty about the range of evidence required to prove a particular offence so as to ensure appropriate investigation planning. Customs also needs to be sure that there is a practical means of presenting evidence that is either difficult to obtain or which is of such a character that its challenge could add significant cost or delay. Averments provide a means of doing so.

93. Averments are used in a variety of circumstances, including prosecution of offences involving revenue fraud, prohibited imports and prohibited exports. However, where any one of the above offences is particularly serious, the matter may be referred to the Director of Public Prosecutions where it could be pursued as a criminal matter. In those cases, the matter would not be a Customs prosecution and averments are not available in this situation.

94. Clearly there are advantages in the use of averments in Customs prosecutions on matters that would otherwise have to be proven through a considerable expenditure of time and resources. Given the existing statutory restrictions within section 255 of the Act and the vigilance of the courts, there are safeguards for the defendant to ensure that evidence is appropriately presented to prove an offence.

95. It is Customs position that the availability of averments in Customs prosecutions be preserved.

May 2003

* * * * *

Appendix A: Customs Compliance Continuum

CLIENT CATEGORIES - BEHAVIOURS AND MOTIVATION

Self regulation	Assisted self regulation	Directed regulation	Enforced regulation
• Informed self assessment • Management is compliance oriented • Includes accredited clients	• Not yet compliant • Attempting compliance • Developing internal control systems	• Resistance to compliance • Lack of compliance • Limited / poor system	• Deliberate non compliance • Criminal intent • Illegal activity

CUSTOMS OPERATIONAL RESPONSE

• Education and training • Maximum pre-arrival / departure clearance • Minimum real time pre-clearance intervention • Some compliance verification: - x-ray - checks of documents and goods • Sanctions may be imposed	• Education and training • Some real time pre-clearance intervention • Some post clearance checking • Compliance verification: - x-ray - checks of documents and goods • Sanctions may be imposed	• Pre and post clearance intervention • Post clearance comprehensive audit • Pre-clearance major examination • Sanctions may be imposed	• Pre and post clearance intervention • Comprehensive audits • Cargo searches (may be covert) • Surveillance • Investigation by multi disciplined teams • Sanctions imposed

RISK

Low *High*

Appendix B: Some of the main Customs prosecutions and their penalties

There are a multitude of Customs prosecutions. Examples include:

S.33 Persons not to move goods subject to the control of Customs. The maximum penalty is 500 penalty units, (500 x $110) ($55,000) for intentional breach, 60 penalty units ($6,600) for unintentional breach.

S.50(4) Contravening the terms of condition of a licence or permission to import goods. The maximum penalty is $11,000.

S.58 Ships and aircraft entering a place other than a port or airport. The maximum penalty is $50,000.

S.60 Breach of boarding requirements. The maximum penalty is $10,000.

S.63A and following. Various reporting requirements in Division 3 of Part IV of the Act- arrival reports, cargo reports, passenger and crew reports, passenger info reports and questions, each with various penalties for conviction thereon.

S.68 and following. Various requirements in Division 4 relating to the entry, unshipment and landing and examination of goods, including reasonably serious ones like the maximum $50,000 penalty for breach of a permission to move goods **(s.71E)**, and $25,000 for breaking bulk **(s.73)**.

S.118 The master of a ship or the pilot of an aircraft departing a port or airport without Customs clearance. The maximum penalty is $50,000.

S.175 The illegal transfer of goods between vessels in the coasting trading, for which the maximum penalty is 250 penalty units, i.e. $27,500.

S.233(1)(a) The smuggling of goods, which, by virtue of s4, is any importation (however small or large) accompanied by an intent to defraud the revenue, for which the maximum penalty is 5 times the duty that would have been payable, or a penalty of $100,000 if the amount of the duty cannot be determined.

S.233(1)(b) The importation of prohibited imports (including tier 1 and tier 2 goods incidentally, if this provision is to be preferred for any reason), for which the maximum penalty is $100,000 [and, similarly, **s.233(1)(c)** for the exportation of prohibited exports].

S.233(1)(d) The unlawful conveyance or possession of smuggled goods or prohibited imports or exports, for which the maximum penalty is 5 times the duty that would have been payable, or $100,000 if the amount of the duty cannot be determined.

S.234(1)(a) The evasion of payment of duty, for which, notably, there is a minimum penalty of not less than twice the amount of the duty sought to be evaded and a maximum penalty of not more than 5 times the amount of that duty sought to be evaded.

S.234(1)(d) The intentionally making of a statement to an officer, reckless as to the statement being false or misleading in a material particular, for which the maximum penalty is $11,000 but, if a statement related to the duty payable, as much as $5,000 plus twice the amount of the duty payable on the goods [see **s.234(3)**].

Consider also the new series of additional offences, most for a maximum penalty of $3,300 each of **s.243T** and **s.243U** (relating to false statements) and $5,500 for **s.243V** (relating to misleading cargo or outturn reports).

There are many other Customs prosecutions in the Act.

Appendix C

ATTORNEY-GENERAL'S DEPARTMENT

LEGAL SERVICES INSTRUCTION NO. 1 OF 1992

USE OF AVERMENTS

Section 255 of the Customs Act 1901 permits the use of averments in Customs prosecutions as prima facie evidence of the matters of fact averred. The present Commonwealth policy on the use of averments was stated by Attorney-General Bowen in a letter dated 15 October 1986 to the Senate Standing Committee on Constitutional and Legal Affairs:

> "Evidentiary aid provisions should only cast an evidential burden on the defendant and should only be relied on for proof of matters which are essentially formal in nature."

The Attorney-General endorsed the recommendation of the Senate Committee that existing averment provisions should only be used:

(1) where the matter which the prosecution is required to prove is formal only and does not in itself relate to any conduct on the part of the defendant; or

(2) where the matter in question relates to conduct of the defendant alleged to constitute an ingredient in the offence charged and is peculiarly within the defendant's knowledge.

2. It is considered that this statement of policy by the Attorney-General is applicable to the use of averments in Customs prosecutions. Officers preparing averments in Customs prosecutions are, therefore, required to take all steps necessary to ensure that the undertaking given by the Attorney-General is not breached.

3. The policy is only concerned with matters not essential to the charge. Under the policy:

- a matter is "formal" if it can be reasonably believed that if parol evidence of the matter were to be provided, that evidence would be uncontested;

- a matter is "peculiarly within the defendant's knowledge" if it is a matter which the defendant knows or could know because of information sources peculiar to the defendant and is difficult or costly for the prosecutor to lead evidence to establish. It is not necessary that a matter be within a person's exclusive knowledge for it to be peculiarly within that person's knowledge.

4. Officers preparing averments in Customs prosecutions should note that "intent" may not be averred (see section 255(4)(a) of the Customs Act). In this provision, "intent" refers to the requisite mental element of the offence which the prosecutor must prove (Jackson v Butterworth [1946] VLR 330 at p333). Averment, however, of mental states which do not form part of the mental element of the offence, eg. knowledge, is permitted as a matter of policy, provided that the Attorney-General's policy is observed. Such an averment may enable a court to draw an inference as to the existence of the requisite mental element (Gallagher v Cendak [1988] VR 731 at p744).

(J.D.Pyne)
Australian Government Solicitor

24 April 1992

Appendix D: Examples of averments and similar evidentiary provisions in Commonwealth legislation

Revenue Legislation

- *A New Tax System (Taxation Administration) Act 1999* - Schedule 2- (Collection and recovery rules) – section 255-50 - Certain statements or averments
- *Pay-Roll Tax Assessment Act 1941* - section 59 - Averment of prosecutor sufficient
- *Excise Act 1901* - section 14 - Averment of prosecution sufficient
- *Taxation Administration Act 1953* - section 8ZL - Averment
- *Stevedoring Levy (Collection) Act 1998* - section 13 - Recovery of levy and penalty

Non-Revenue Legislation

- *Air Passenger Ticket Levy (Collection) Act 2001* - section 15 - Recovery of levy
- *Criminal Code Act 1995* - section 13.6 - Use of averments
- *Fisheries Management Act 1991* - section 166 - Evidence
- *Great Barrier Reef Marine Park Act 1975* - section 62 - Averment in relation to Marine Park
- *Environment Protection And Biodiversity Conservation Act 1999* - sections 25B - Evidentiary certificates
- *Quarantine Act 1908* - section 86DA - Evidence of analyst

Appendix E: Examples of averments and similar evidentiary provisions in foreign Customs legislation

Canada

Customs Act 1985 (as at 31 August 2002)

Section 152. (1) In any proceeding under this Act relating to the importation or exportation of goods, the burden of proof of the importation or exportation of the goods lies on Her Majesty.

Proof of importation

(2) For the purpose of subsection (1), proof of the foreign origin of goods is, in the absence of evidence to the contrary, proof of the importation of the goods.

Burden of proof on other party

(3) Subject to subsection (4), in any proceeding under this Act, the burden of proof in any question relating to

(*a*) the identity or origin of any goods,

(*b*) the manner, time or place of importation or exportation of any goods,

(*c*) the payment of duties on any goods, or

(*d*) the compliance with any of the provisions of this Act or the regulations in respect of any goods

lies on the person, other than Her Majesty, who is a party to the proceeding or the person who is accused of an offence, and not on Her Majesty.

Exception in case of prosecution

(4) In any prosecution under this Act, the burden of proof in any question relating to the matters referred to in paragraphs (3)(*a*) to (*d*) lies on the person who is accused of an offence, and not on Her Majesty, only if the Crown has established that the facts or circumstances concerned are within the knowledge of the accused or are or were within his means to know.

United Kingdom

Customs and Excise Management Act 1979

Section 154 Proof of certain other maters

(1) An averment in any process in proceedings under the customs and excise Acts -

a) that those proceedings were instituted by the order of the Commissioners; or
b) that any person is or was a Commissioner, officer or constable, or a member of Her Majesty's armed forces or coastguard; or
c) that any person is or was appointed or authorised by the Commissioners to discharge, or was engaged by the orders or with the concurrence of the Commissioners in the discharge of, any duty; or
d) that the Commissioners have or have not been satisfied as to any matters as to which they are required by any provision of those Acts to be satirised; or
e) that any ship is a British ship; or
f) that any goods thrown overboard, staved or destroyed were so dealt with in order to prevent or avoid the seizure of those goods,

shall, until the contrary is proved, be sufficient evidence of the matter in question.

(2) Where is any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not -

a) any duty has been paid or secured in respect of any goods; or
b) any goods or other things whatsoever are of the description or nature alleged in the information, writ or other process; or
c) any goods have been lawfully imported or lawfully unloaded from any ship or aircraft; or
d) any goods have been lawfully loaded into any ship or aircraft or lawfully exported or were lawfully water-borne; or
e) any goods were lawfully brought to any place for the purpose of being loaded into any ship or aircraft or exported; or
f) any goods are or were subject to any prohibition of or restriction on their importation or exportation,

then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the customs and excise Acts, the burden of proof shall lie upon the other party to the proceedings.

New Zealand

Customs and Excise Act 1996

Section 239 - Burden of proof

(1) In any proceedings under this Act instituted by or on behalf of or against the Crown (other than a prosecution for an indictable offence) every allegation made on behalf of the Crown in any statement of claim, statement of defence, plea, or information, that relates to

(a) The identity or nature of any goods; or

(b) The value of any goods for duty; or

(c) The country or time of exportation of any goods; or

(d) The fact or time of the importation of any goods; or

(e) The place of manufacture, production, or origin of any goods; or

(f) The payment of any duty on goods,

shall be presumed to be true unless the contrary is proved.

(2) The presumption in subsection (1) of this section shall not be excluded by the fact that evidence is produced on behalf of the Crown in support of any such allegation.

(3) The provisions of this section shall extend and apply to proceedings in which the existence of an intent to defraud the revenue of the Customs is in issue.

(4) Notwithstanding the foregoing provisions of this section, in any proceedings for an offence against this Act where it is alleged that the defendant intended to commit the offence, the prosecution has the burden of proving that intent beyond reasonable doubt.

Section 211 - Defrauding the revenue of Customs

(1) Every person commits an offence who does any act or omits to do any act for the purpose of

(a) Evading, or enabling any other person to evade, payment of duty or full duty on goods:

(b) Obtaining, or enabling any other person to obtain, money by way of drawback or a refund of duty on goods to which that person or that other person is not entitled under this Act:

(c) Conspiring with any other person (whether that other person is in New Zealand or not) to defraud the revenue of the Customs in relation to goods:

(d) Defrauding in any other manner the revenue of the Customs in relation to goods.

(2) Every person who commits an offence against this section is liable on conviction,

(a) In the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding $10,000; or

(b) In the case of a body corporate, to a fine not exceeding $50,000; or

(c) In either case, to a fine of an amount not exceeding 3 times the value of the goods to which the offence relates.