SUPREME COURT OF QUEENSLAND

CITATION:	*Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Others* [2006] QCA 558
PARTIES:	**CHIEF EXECUTIVE OFFICER OF CUSTOMS** (plaintiff/respondent) **v** **LABRADOR LIQUOR WHOLESALE PTY LTD** ACN 050 406 221 (first defendant/first appellant) **LAWRENCE ERIC WRIGHT** (second defendant/second appellant) **JEFFREY ANDREW JOHN BRYCE** (third defendant/second appellant)
FILE NO/S:	Appeal No 1812 of 2006 Appeal No 2938 of 2006 SC No 904 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2006; 14 November 2006
JUDGES:	de Jersey CJ, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, de Jersey CJ and Williams JA concurring as to the orders made, Jerrard JA dissenting in part
AMENDED ORDER:	**1. Allow the appeal of the first appellant against conviction for an offence against s 120(1)(vi) of the *Excise Act 1901* (Cth) with respect to each of the shipments but otherwise dismiss the appeal of the first appellant against conviction.** **2. Allow the appeal of the second and third appellants against conviction only to the extent of setting aside the convictions for an offence against s 120(1)(vi) of the *Excise Act* with respect to the seven shipments and setting aside the conviction for an offence against s 120(1)(iv) of the *Excise Act* with respect to the Honiara shipment and setting aside the order that each of the second and third appellants pay a penalty of $416,858.50 with respect to offences against s 120(1)(iv) of the *Excise Act.***

3. Dismiss the appeal of all appellants against sentence.

CATCHWORDS: TAXES AND DUTIES – CUSTOMS AND EXCISE – PENAL PROVISIONS – EVASION OF DUTY AN FALSIFICATION OF ENTRIES AND DOCUMENTS – GENERAL – appellants were each convicted of offences against the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) – appellants devised a scheme to deliver dutiable and customable goods into home consumption without paying duty – where there was no direct evidence that the goods were delivered into home consumption – where respondent averred that appellants delivered customable and excisable goods into home consumption – whether the trial judge made findings of fact based on his analysis of the evidence from which he drew the inferences necessary to support the conviction – whether the trial judge relied on the averments that the goods were delivered into home consumption to support the convictions – whether the trial judge was justified in drawing the inference that the goods were delivered for home consumption – whether the trial judge erred in convicting the appellants pursuant to s 33 of the *Customs Act* – whether there was insufficient evidence to support the finding of offences against s 234(1)(d) of the *Customs Act*

TAXES AND DUTIES – CUSTOMS AND EXCISE – PENAL PROVISIONS – EVASION OF DUTY AN FALSIFICATION OF ENTRIES AND DOCUMENTS – PENALTIES – OTHER OFFENCES – whether the sentencing judge erred in imposing sentences of imprisonment – whether the financial penalties were manifestly excessive – whether the default periods of imprisonment were manifestly excessive

Criminal Code 1899 (Qld), s 668E(1A)
Customs Act 1901 (Cth), s 5, s 234(1), s 234(2), s 243B, s 244, s 245, s 247, s 255, s 263
Crimes Act 1914 (Cth), s 3(2), s 4F, s 5, s 15A(1), s 16C, s 19AB, s 21B(1)
Crimes Amendment (Enforcement of Fines) Act 1998 (Cth), s 8
Excise Act 1901 (Cth), s 5, s 61, s 120(1), s 120(2), s 133, s 134, s 144
Judiciary Act 1903 (Cth), s 68, s 79
Penalties and Sentences Act 1992 (Qld), s 182, s 182A
Treasury Legislation Amendment (Application of Criminal Code) Act (No 2) 2001 (Cth)

Aruli v Mitchell (unreported, FCt SCt of WA, Appeal Nos No 1090 of 1998, 1091 of 1998, 1092 of 1998, 31 March 1999, 31 March 1999), considered
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors (2003) 216 CLR 161; [2003]

HCA 49, considered
Chief Executive Officer of Customs v El Hajje (2005) 79 ALJR 1289; [2005] HCA 35; M171 of 2004, 3 August 2005, cited
Djou v Commonwealth Department of Fisheries (2004) 150 A Crim R 255; [2004] WASCA 282; SJA 1076 of 2004, 26 November 2004, considered
Edwards v The Queen (1993) 178 CLR 193, cited
Environmental Protection Agency v Ableway Waste Management Pty Ltd [2005] NSWLEC 469; LEC No 40544 of 2004, 22 September 2005, considered
L Vogel and Son Pty Ltd v Anderson (1968) 120 CLR 157, considered
New South Wales v Commonwealth of Australia (2006) 231 ALR 1; [2006] HCA 52; S592 of 2005, P66 of 2005, A3 of 2006, B5 of 2006, B6 of 2006, S50 of 2006, M21 of 2006, 14 November 2006, considered
Perez v R (1999) 21 WAR 470; [1999] WASCA; CCA 158 of 1998, 22 November 1999, considered
Reardon v Nolan (1983) 74 FLR 309, considered
R v Booth [1998] 1 Qd R 656, considered
R v Hush; ex parte Devanny (1932) 48 CLR 487, cited
Smith v The Queen (1991) 25 NSWLR 1, considered
Weiss v The Queen (2006) 223 ALR 662; [2005] HCA 81; M50 of 2005, 15 December 2005, cited

COUNSEL: R J Burbidge QC, with P J Woods, for the appellants
R F Gotterson QC, with F W Redmond, for the respondent

SOLICITORS: O'Keefe Mahoney Bennett for the appellants
Australian Government Solicitor for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Williams JA, with which I agree. I agree in the orders proposed by His Honour.

[2] I am also indebted to Jerrard JA for his reasons. My only points of difference in relation to those reasons concern the primary Judge's reliance on averments in relation to the third appellant (which was I considered "in passing" to the point of being insignificant), and as to the applicability of s 19AB of the *Crimes Act 1914* (Cth) (inapplicable, in my view, because the imposition of any imprisonment here has been done only contingently upon non payment).

[3] **WILLIAMS JA:** After a lengthy trial each appellant was convicted of offences against the *Customs Act* 1901 ("CA") and the *Excise Act* 1901 ("EA") and orders were made and penalties imposed upon those convictions. The final orders were set out in a Schedule to the reasons for judgment of the trial judge; that Schedule was as follows:

"SCHEDULE

Orders

1. I order that each defendant pay the penalties set out in column 2 of the table below in respect of offences under s 234(1)(a) of the *Customs Act* 1901 ("CA") and the penalties set out in column 5 of that table in respect of offences under s 120(l)(iv) the *Excise Act* 1901 ("EA").

2. I order that if the second defendant or the third defendant fails to pay any such penalty immediately, he be imprisoned for the term set against that penalty in column 3 (in respect of the CA penalties) or column 6 (in respect of the EA penalties).

3. I order that the defendants make reparation to the Commonwealth of Australia of the amounts set out in columns 4 and 7 of the table below.

4. I order that the defendants pay the plaintiffs costs of these proceedings to be assessed.

5. I grant all parties liberty to apply on five days notice to the other parties.

1	2	3	4	5	6	7
Voyage	**CA penalty**	**Default**	**CA reparation**	**EA penalty**	**Default**	**EA reparation**
	$	**Days**	**$**	**$**	**Days**	**$**
Fiji 1	665,889.40	238	133,177.88	16,172.50	6	3,234.50
Fiji 2	527,500.10	188	105,500.02	112,545.35	40	22,509.07
Fiji 3	591,682.45	211	118,336.49	18,608.35	7	3,721.67
Fiji 4	632,557.30	226	126,511.46	61,076.85	22	12,215.37
Fiji 5	636,902.85	227	127,380.57	61,076.85	22	12,215.37
Fiji 6	372,873.00	133	74,574.60	51,762.15	18	10,352.43
Fiji 7	533,359.70	190	106,671.94	362,422.75	129	72,484.55
Honiara	**–**	**–**	**–**	416,858.50	**149**	83,371.70

[4] As is obvious from that Schedule the offences related to seven containers of goods shipped to Fiji and one container shipped to Honiara. As found by the trial judge the shipments to Fiji essentially involved the movement of liquor, whilst the shipment to Honiara involved a large quantity of cigarettes. The first appellant carried on business as a liquor wholesaler, and operated a "licensed warehouse" (bond store) pursuant to the provision of the CA. The second and third appellants were the only directors and employees of the first appellant.

[5] The findings of the trial judge, amply supported by the evidence, demonstrate the following modus operandi designed to evade the payment of customs and excise duty. At the material time the first appellant had stationery with what was called the old style and new style letterhead. The trial judge in his reasons used the expressions old style invoice and new style invoice to refer to documents created using the two types of stationery available. It is convenient to adopt that course here.

[6] With respect to each of the shipments documents were prepared in accordance with following pattern. New style invoices, and necessary accompanying documents, were prepared indicating the export of a large quantity of spirits (cigarettes in the case of the Honiara shipment). Those documents were then submitted to the appropriate customs and excise authorities and a clearance obtained. Because the goods were being exported no duty was payable, although the goods in question had become subject to duty once they entered the warehouse.

[7] Another set of documents on the old style letterhead were then prepared. Those documents referred to a small quantity of spirits (in the case of Honiara, cigarettes) and a quantity of other goods (for example beer or water) which did not attract the same amount of duty as the spirits on the new style documentation. Containers for shipment were then packed in accordance with the old style documentation and it was that old style documentation which was submitted to the importer in Fiji or Honiara. That old style documentation was then produced to customs officials in Fiji and Honiara and on the opening of the seals on the containers customs checks revealed the contents matched the particulars in the old style documentation.

[8] In all cases, in broad terms, the importer in Fiji and Honiara paid the amount referred to in the old style documentation.

[9] The difference between the amount shown in the old style documentation and that revealed in the new style documentation was then deposited to the account of the first appellant by the deposit of large amounts of cash at banks in New South Wales. The learned trial judge did not accept (clearly correctly) that those payments were made by the consignees of the goods.

[10] The consequence was that the records of the first appellant held in Brisbane showed the export of a large quantity of spirits and cigarettes on the basis that no duty was payable; the register of stock held in the bond store and the accounts of the company supported that position. In fact only a much smaller quantity of the liquor and cigarettes had been exported.

[11] The foregoing is a brief summary of the position. The learned trial judge in his reasons of 6 February 2006 has set out in much greater detail each of the transactions as established by the evidence. Where necessary reference should be made to that detail in order to better understand the brief summary I have included in these reasons.

[12] In the final version of the statement of claim it was alleged with respect to each of the transactions that the goods were excisable or customable goods, that the goods were not delivered for exportation to a place outside Australia, that the goods were subject to the control of customs, and that the goods were delivered for home consumption (see, for example, paragraphs [16] and [32] of that statement of claim).

The goods referred to in those paragraphs were particularised as the goods shown in the new style invoices and not exported in accordance with the particulars contained in the old style invoices. The evidence and the findings of fact made by the trial judge clearly establish that the goods referred to were not exported. While in the bond store it was not disputed that the goods were excisable or customable goods and were subject to the control of customs.

[13] On the findings made by the trial judge various offences were committed. Section 33 of the CA provided: "Except as authorised by this Act, a person shall not move, alter or interfere with goods that are the subject of the control of Customs." The goods in question were clearly subject to the control of Customs and the finding was that they were moved without authorisation in that they were delivered for home consumption. Section 234(1)(a) of the CA provided that a person shall not "evade payment of any duty which is payable". On the finding that the goods were delivered into home consumption without the payment of duty an offence against that provision was established. Section 234(1)(d) provided that a person shall not knowingly or recklessly make a statement to an officer that is false or misleading in a material particular. The allegation here was that the new style invoice in each instance constituted a false or misleading statement to an officer which was made knowingly. On that basis an offence against that provision was established.

[14] Section 61 of the EA provided that all excisable goods subject to the control of Customs must not be moved or interfered with except as authorised by the Act. Once the finding was made that the goods were delivered for home consumption without the appropriate authorisation offences under that section were established. Section 120(1)(iv) of the EA provided that a person shall not evade payment of any duty which is payable. The delivery of the goods in each instance into home consumption without paying the appropriate duty evidenced a commission of an offence against that provision.

[15] Subject to a matter which will be later discussed with respect to the Honiara shipment, each of the appellants was convicted of offences against sections 33, 234(1)(a) and 234(1)(d) of the CA and sections 61 and 120(1)(iv) of the EA with respect to each of the transactions. Convictions were also recorded against each appellant for an offence against s 120(1)(vi) of the EA which is the counterpart of s 234(1)(d) of the CA; it will be necessary to return to those convictions later.

[16] The major ground on which the appellants seek to overturn the convictions is that there was no evidence that the goods in question were delivered for home consumption and it was submitted that in the circumstances the trial judge was wrong in drawing the inference that the goods had been so delivered. As was established by the decision of the High Court when this case went on appeal on a preliminary issue, proof beyond reasonable doubt was required: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* (2003) 216 CLR 161. The relevant passages in the reasons of the trial judge are as follows:

> "[5] The onus is on the plaintiff to prove beyond reasonable doubt that the goods were not exported as the defendants allege. In theory the plaintiff could have relied upon the averments alone to satisfy that onus, but he did not do so. He mounted a substantial circumstantial case to demonstrate that the goods were not exported. The evidence of the defence witnesses, Mr Wright in particular, was directed toward showing that they were exported. If the plaintiff

> demonstrates that the goods were not exported, the only alternative conclusion open on the evidence and the averments will be that the goods were delivered into home consumption. There is no suggestion that any of them was entered for such consumption. It follows that if the plaintiff succeeds on each count in relation to step c, [the goods were not exported from Australia], the eight counts of evasion will be proved against Labrador (a finding that the evasion was intentional would be inevitable). If he proves that Messrs Wright and Bryce were knowingly concerned in the evasion, the case against them on that charge also will succeed."
>
> "[58] Having regard to all of the circumstances discussed above, I have reached the conclusion that the plaintiff has proved his case. The circumstances supporting that case overwhelm those favouring the defence. I can conceive of no rational hypothesis consistent with innocence. The old-style invoice for the first Fiji shipment was typed by Mrs Lapre on the instructions of Mr Wright. The goods listed in that invoice were in the container when Mr Narayan inspected it on or immediately before 22 May 1995. They were placed in the container at Labrador's premises before the container was exported. Mr Bryce was the person who packed all containers at those premises. Except for the 58 cases of Regency Scotch whisky common to both invoices, the goods listed in the new style invoice for the shipment were not exported and the export clearance submitted by Labrador to Customs in accordance with that invoice was false and misleading. As Labrador's stock book shows, they ceased to be part of the stock held under bond. I infer they were delivered for home consumption. The plaintiff's averment to that effect is correct. That process must have involved moving them while they were subject to Customs control. I am satisfied of these conclusions beyond reasonable doubt, and on the evidence can find no rational hypothesis consistent with innocence. The circumstances in favour of this conclusion overwhelm all others."

[17] The first quoted passage relates to the shipments generally, and the second to the first shipment to Fiji. Similar passages are to be found in the reasons for judgment with respect to the other shipments to Fiji, and the one to Honiara.

[18] It is clear in my view from those passages that the judge at first instance did not rely on the averments in order to arrive at his conclusion. He did so by considering the evidence and drawing inferences from facts found. It is true that there is no actual evidence that the goods in questions were delivered for home consumption, but I agree that the only inference open is that they were so delivered.

[19] It was submitted by senior counsel for the appellants on the hearing of the appeal that, whilst the appellants may have intended to defraud the respondent by delivering the goods in question into home consumption (as found by the learned trial judge), they may not in fact have done so and in consequence, given that proof beyond reasonable doubt was required, the inference drawn was not available. The proposition in essence was that the relevant goods might still have been in the bond store. That contention must be rejected.

[20] The evidence and findings clearly establish that over a period of time the appellants had gone to great trouble to devise a scheme which would enable them to deliver dutiable goods into home consumption without paying duty. That was the only possible explanation for their conduct in devising the scheme and using the dual set of invoices. The only rational explanation for embarking on that course and exposing themselves to the possible risk of prosecution for customs offences was that the potential rewards were high. Further, the second and third appellants were the only directors and shareholders of the first appellant. Each of them gave evidence to the effect that the goods in question had in fact been exported. If, despite the fact that the appellants' records showed that the goods had been exported, those goods were still in the bond store then that was something peculiarly within the knowledge of the second and third appellants. At the time they gave evidence they must have realised that they were facing the possibility of having to pay huge monetary penalties if it was held that the goods in question were not exported. In those circumstances if the goods were still in the bond store one would have expected that either or both of them would have said so.

[21] For all of those reasons the judge at first instance was clearly justified in drawing the inference that the goods had in fact been delivered for home consumption.

[22] Counsel for the appellants also submitted that the convictions should be set aside because the respondent wrongly relied on averments, and that the trial judge erred in relying on averments in order to find facts necessary to support the convictions. The argument for the appellants was largely based on the proposition that reliance was placed at trial on incorrect versions of applicable legislation.

[23] At all material times s 255 of the CA provided:

> "(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) This 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 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 creditability 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 prison.
>
> (5) This section shall not lessen or affect any onus of proof otherwise falling on the defendant."

[24] The counterpart of that in the EA was s 144; apart from the reference in sub-section (1) to an "excise prosecution" it was in identical terms to s 255 of the CA.

[25] The relevant conduct of the appellants occurred in 1995 and 1996 and the proceedings were commenced in the Supreme Court in 1997. The trial took place in 2005 and judgment was delivered early in 2006. The *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2) 2001* (Cth) amended s 144 of the EA by repealing sub-section (4) and substituting the following:

> "(4) Subsection (1) does not apply:
>
> (a) to any fault element of an offence; or
>
> (b) in relation to any offence for which imprisonment is a penalty; or
>
> (c) to any proceedings for an indictable offence."

Section 4 of that Act provided that each amendment made by the Act "applies to acts and omissions that take place after the amendment commences."

[26] In order to appreciate the argument on behalf of the appellants it is necessary to also examine some amendments to s 61 of the EA. Relevantly it initially provided:

> "All excisable goods are . . . subject to the control of Customs and must not be moved, altered or interfered with except as authorised by this Act.
>
> Penalty: $20,000.00."

[27] That was repealed and a new section substituted by the *Excise Amendment (Compliance Improvement) Act 2000* (Cth) which came into force when assented to on 7 September 2000. The new s 61 provided:

> "(1) All excisable goods are subject to the control of Customs until delivered for home consumption or for exportation to a place outside Australia, whichever occurs first.
>
> (2) A person must not, without permission, intentionally move, alter or interfere with excisable goods that are subject to the control of Customs knowing, or being reckless as to whether, the goods are excisable goods that are subject to the control of Customs.
>
> Penalty: 2 years imprisonment or the greater of:
>
> (a) 500 penalty units; and
>
> (b) 5 times the amount of duty that would be payable if the goods had been entered for home consumption on the penalty day."

[28] The argument for appellants depended on the fact that as at the date of trial an offence against s 61 of the EA provided that punishment by way of imprisonment could be directly imposed upon conviction. The argument was that if s 144 of the EA in its original form applied averments could not be relied on, at least with respect to contraventions of s 61, because such proceedings were for "an offence

directly punishable by imprisonment". The argument could only succeed if the new s 61 applied.

[29] Counsel for the respondent met that submission by relying on s 4F of the *Crimes Act 1914* (Cth), which relevantly provided:

> "(1) Where a provision of the law of the Commonwealth increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased only applies to offences committed after the commencement of that provision."

In my view counsel for the respondent was correct in relying on s 4F to demonstrate that the new s 61 of the EA was irrelevant for present purposes. The offences with which the court was concerned were against the original s 61, and the proceedings were in relation to offences under that provision. In its original form s 61 did not create an offence directly punishable by imprisonment therefore s 144 could be relied upon to support the use of averments in the prosecution if its original form was still applicable.

[30] That leads to the next contention of appellants. It was submitted that the relevant form of s 144 was that after the amendment effected in 2001. It will be noted that the new form omits the word "directly", and also extends the exception to "any fault element of an offence". But, as pointed out by counsel for the respondent the amendment to s 144 only applies to "acts and omissions that take place after the amendment commences". That can only mean in context that the new provision with respect to averments will only apply to prosecutions for offences relying on acts and omissions that took place after the amendment commenced. On that basis the amendment is not relevant for present purposes.

[31] It follows that all material times for purposes of the present proceeding s 144 of the EA was in identical terms with s 255 of the CA and the trial judge applied the appropriate statutory provisions when considering the averments. As is made evident by paragraphs such as [5] and [58] of the judgment quoted above, the trial judge did not rely on averments in order to make the findings of fact necessary to record convictions. He analysed the evidence in great depth, made findings of fact based on the evidence which he accepted, and then drew inferences from those facts entitling him to record convictions; having reasoned in that way he then made the observation that in the light of those findings the averments were "correct".

[32] The only occasion on which the trial judge may have given the averments greater weight was in relation to the third appellant. He dealt specifically with the position of the third appellant at the end of his reasons of judgment of 6 February 2006. After referring to the evidence of the third appellant and other matters he said at [254]:

> "It remains to determine Mr Bryce's guilt or innocence. That must be decided on the basis of the evidence, taking the averment provisions into account. On that basis I am satisfied of his guilt on all charges beyond reasonable doubt."

[33] He footnoted the reasoning with a reference to the judgment of Hayne J at 216 CLR paragraph [144].

[34] When one considers that the third appellant was a director of the company, gave evidence that he packed relevant containers for export, and gave evidence (which the learned trial judge rejected) that the containers as packed contained goods as shown in the new style documentation there was no need, given the other basic findings of fact, to rely on averments in order to convict him.

[35] My interpretation of the trial judge's reasons is that, though he referred generally to the averments, he did not specifically rely on them in order to convict the third appellant. But if I should be wrong in so concluding I would agree with Jerrard JA that this was an appropriate case for the application of the proviso. The evidence and findings, without relying on the averments, meant that convictions were inevitable.

[36] The relevant statement of claim is introduced with the words: "Pursuant to the provisions of s 255 of the *Customs Act* 1901 and s 144 of the *Excise Act* 1901, the plaintiff says and avers and it is the fact that . . ."; thereafter follows more than 200 paragraphs in a pleading occupying some 129 pages. Many of the allegations contained in the pleading are not strictly the proper subject matter for an averment. The appellants complain that in consequence the proceeding was oppressive and reference was made to *R v Hush; ex parte Devanny* (1932) 48 CLR 487. The observations by Gavan Duffy CJ and Starke J at 500-501 and Evatt J at 513 in *Hush* are apposite here. Only facts necessary to sustain the offence charged should be averred. The practice adopted in this case should not be followed in the future. But at the end of the day I am not persuaded that averring all of the matters alleged in the statement of claim prejudiced the trial of the action or resulted in findings being made which would not have been made having regard only to the evidence.

[37] I am not persuaded that there is anything in the submissions addressed to the court by counsel for the appellants with respect to the use made of averments which would have the consequence of requiring this court to set aside the convictions.

[38] It is now necessary to deal with other submissions made on behalf of the appellants relating to convictions.

[39] It was submitted on behalf of the appellants that the trial judge was wrong in convicting the appellants of offences pursuant to s 33 of the CA. As already noted it was in the following terms:

> "(1) Except as authorised by this Act, a person shall not move, alter or interfere with goods that are subject to the control of the Customs.
>
> Penalty: $50,000.00."

The submission was that s 33(1) was a revenue provision entitling the respondent to recover a sum of money if conduct provided for by the section was established. It was submitted it did not create an offence for which a conviction could be recorded. Counsel contrasted s 33(1) with sub-section 2; that provides that if a person "who commits an offence against sub-section (1)" does the act that constitutes the offence, for example, at the direction or with the consent of another person, that "other person commits an offence and is punishable, on conviction, by a fine not exceeding $50,000.00." Because sub-section (2) expressly refers to conviction and fine it was submitted that sub-section (1) did not create an offence punishable on conviction.

The argument is false. Section 5 of the CA provides as follows:

> "The penalty, pecuniary or other, set out:
>
> (a) at the foot of a section of this Act; or
>
> (b) at the foot of a subsection of a section of this Act, but not at the foot of the section;
>
> indicates that a contravention of the section or of the subsection, as the case may be, whether by act or omission, is an offence against this Act, punishable upon conviction by a penalty not exceeding the penalty so set out."

I can see no reason why s 5 does not apply to s 33. Senior counsel for the appellants submitted that s 5 only applied where the provision in the Act specifically referred to conviction - such as, for example, s 33(2). But that cannot be the intention. Clearly s 5 applies to all situations where there is merely a penalty stated at the foot of a section without more. Reading the two provisions together it is clear that s 33(1) creates an offence with respect to which there may be a conviction.

[40] That is also made clear, in my view, by s 244 of the CA. It provides that: "Proceedings by the Customs for the recovery of penalty other than a pecuniary penalty referred to in s 243B under this Act or for the condemnation of ships, aircraft or goods seized as forfeited are herein referred to as Customs Prosecutions". If follows that proceedings for the recovery of a penalty under s 33 is a Customs Prosecution.

[41] It follows that the trial judge was correct in recording convictions for offences against s 33 of the CA.

[42] Section 249 of the CA and s 138 of the EA provide that prosecutions must be instituted within five years "after the cause thereof". In May 2005, without specifically getting the leave of a judge pursuant to s 81 of the *Supreme Court of Queensland Act 1991* (Qld) or r 376 of the Uniform Civil Procedure Rules 1999 (Qld) ("UCPR"), the respondent delivered an amended statement of claim alleging a breach of s 120(1)(vi) of the EA with respect to each of the transactions. Such a breach had not been alleged in earlier versions of the Statement of Claim. But when setting out at the end of the pleading what the plaintiff claimed, no conviction was sought with respect to an offence against s 120(1)(vi) of the EA. Section 120(1)(vi) is the analogue of s 234(1)(d) of the CA which deals with the making of a false statement to a customs official. The evidence establishing an offence against s 234(1)(d) of the CA also established an offence against s 120(1)(vi) of the EA.

[43] Notwithstanding that the pleading when setting out the claims made by the respondent did not refer to convictions pursuant to s 120(1)(vi) of the EA, the judge at first instance convicted the appellants of seven counts involving that provision. That can best be seen from the Schedule contained in paragraph [2] of the reasons for judgment on penalty of 15 March 2006. The appellant submit that such convictions ought not to have been recorded because the charges were laid outside the five year limitation period, leave of the court was not formally obtained to the making of the amendments, and no formal claim for a conviction was made.

Counsel for the respondent submitted that, relying on s 140 of EA, this court should amend the claim so that there was coincidence between the evidence adduced at trial and the relief sought, and so that formal convictions for a breach of s 120(1)(vi) of the EA could properly be recorded. But counsel for the respondent conceded that even if that was done there would be no alteration to the penalties imposed. The judge at first instance was conscious of the problem of penalising the respondents twice for the same offence. It is obvious from the Schedule of orders set out in paragraph [1] hereof that no penalty was imposed with respect to a conviction of an offence against s 120(1)(vi) of the EA although as already noted a formal conviction had been recorded. The recording of those convictions did not in anyway operate to increase the penalties imposed. In the circumstances leave to amend as sought by the respondent should be refused and the convictions for an offence against s 120(1)(vi) of the EA should be set aside.

[44] There was also a submission that there was insufficient evidence to support a finding that the offences against s 234(1)(d) of the CA were proved because a conclusion that the representations were intentionally false was not open. Given all of the findings by the trial judge that submission must be rejected. There was a specific finding that the false invoices were created at the direction of the second appellant, Wright. The evidence of Bryce, the third appellant, was that the containers were packed in accordance with the new style documentation. That evidence must inevitably lead to a conclusion that each appellant was a party to the making of an intentionally false statement to customs officials. There is no substance in this contention.

[45] There is however one further error which needs to be corrected. Counsel for the respondent conceded that the second and third appellants were not prosecuted for an offence of evasion under s 120(1)(iv) of the EA with respect to the Honiara shipment; the evasion offence was alleged and proved only against the first appellant. The second and third appellants have been convicted of the evasion offence pursuant to s 120(1)(iv) in connection with the Honiara shipment and each has been ordered to pay a penalty of $416,858.50 and make reparation in the sum of $83,371.70 consequent upon those convictions. Those convictions should be set aside and the orders set out in paragraph [2] of these reasons should be amended appropriately.

[46] Subject to those matters the appeals against the convictions must be dismissed.

[47] I agree generally with what has been written by Jerrard JA on the appeal against the penalty imposed.

[48] If the second and third appellants are imprisoned in default of payment of the penalties imposed, and that period of imprisonment is for more than three years, then it is arguable they could apply pursuant to s 19AB of the *Crimes Act* 1914 for a non-parole period to be fixed; but it is not appropriate to determine such entitlement at this stage.

[49] The orders should therefore be:

(i) Dismiss the appeal of the first appellant against conviction;

(ii) Allow the appeal of the second and third appellants against conviction only to the extent of setting aside the conviction for an offence against

s 120(1)(iv) of the *Excise Act 1901* with respect to the Honiara shipment and the order that each of the second and third appellants pay a penalty of $416,858.50 with respect to such an offence;

(iii) Dismiss the appeal of all appellants against sentence.

[50] **JERRARD JA**: In this appeal I have read the reasons for judgment of Williams JA on the appeals against conviction, and respectfully agree with those, subject to a different view on the use of averments by the learned trial judge. I add the following further details and reasons, adopting the description already provided by Williams JA, and repeating his nomenclature.

[51] On 6 February 2006 each of the appellants was convicted of a total of 45 offences against the *Customs Act 1901* (Cth) and *Excise Act 1901* (Cth), in a customs[1] and excise[2] prosecution conducted before a single judge of the Supreme Court. Some of those convictions were for offences of evading customs duty and excise duty, and the learned judge calculated the duty evaded as $1,012,257. The schedule reproduced by Williams JA shows that on 15 March 2006 the judge ordered that each appellant pay a penalty specified in respect of each separate offence of evasion of either customs or excise duty of which the appellants were convicted, and the total of the penalties ordered to be paid by each appellant was five times the duty evaded in respect of each of those offences. The learned judge also ordered that if either of the appellants, Mr Wright or Mr Bryce, failed to pay immediately any of the ordered penalties, that appellant was to be imprisoned for the number of days specified by the learned judge in respect of each such penalty and offence. The total of the periods of default imprisonment ordered by the judge was very nearly five years imprisonment. Each appellant has appealed the convictions and sought leave to appeal the amount of each penalty, and an order each appellant pay reparation; and Mr Wright and Mr Bryce sought leave to appeal the orders for default imprisonment and the period ordered.

The evidence

[52] None of the facts found by the learned trial judge were challenged on the appeal, apart from the final inference drawn by the judge, namely that the goods, the subject of the charges, had been delivered into home consumption by the appellants without the appropriate duty being paid. The unchallenged findings of fact included that Mr Wright had directed the creation of both genuine and false invoices and packing lists for each of the relevant containers, on "old style" and "new style" company letterhead respectively. He employed the services of a professional typist at Toowong to type all the new style invoices, pro-forma invoices and packing lists, and the old style invoices used for the second of the Fiji shipments; and a different professional typist, based at Zillmere, to type all of the other old style invoices, used for the first shipment to Fiji, the third to the seventh shipments of containers there, and the shipment to Honiara.

Agreed facts

[53] The prosecution called a substantial number of witnesses, and the greater part of the lengthy and careful analysis of the evidence undertaken by the learned trial judge involves consideration of that oral evidence. In addition a statement of agreed facts

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1 *Customs Act 1901*, see ss 244, 245, and 247.

2 *Excise Act 1901*, see ss 133 and 134.

was put before the learned judge.[3] Those included agreements that the first defendant operated a licensed warehouse, and that the licence granted by Customs allowed it to store alcohol and cigarettes duty free until those goods were exported or entered for home consumption. If they were exported, neither customs nor excise duty was payable, but if delivered into home consumption, one or other of those duties was payable, depending on whether the goods had been imported or manufactured locally. The parties agreed the first defendant was required to keep a register of the goods it received and how and when those were acquitted out of the warehouse; it kept three registers, including one for alcoholic beverages that it received already bottled (the "bond register") and an "in-house" bond register for its own brand of alcohol. Those registers recorded the dates that goods were received into and moved out of the warehouse.

[54] The agreed facts included that goods in Australia are entered for export through the Customs computer system called Exit, and that a Customs Broker enters the data into a computer as the goods to be exported, and transmits that data to Customs, and its computer then allocates a unique identifying number to that export entry, known as an export clearance number ("ECN").

[55] It was agreed that once the first defendant had packed the goods the subject of the proceedings into relevant shipping containers, each container was closed, locked and sealed. It was agreed that at the time each relevant container was packed the first defendant had had in its warehouse goods of the type and quality listed in each of the relevant new style invoices. It was also agreed that on each relevant occasion the first defendant had recorded the acquittal of the goods shown on the new style invoice out of its warehouse in the bond register and the in house products bond register, and that those entries had been written by Mr Wright.

[56] The statement of agreed facts did not identify Mr Bryce as the person who had packed any or all of the shipping containers in which were purportedly exported the goods the subject of the prosecution. The pleadings did not allege or admit that Mr Bryce packed those containers, and that description of his role seems to have emerged first in the opening of the appellant's case by Mr Hack SC[4], in the evidence-in-chief of Mr Wright[5], and was generally accepted by Mr Bryce in his evidence-in-chief and cross-examination. Evidence of specific acts by Mr Bryce emerged in the defence case rather than the prosecution. Whatever the strength of the prosecution case against him before the defence case was opened, it strengthened considerably after that.

Purported payments

[57] For each of the seven shipments to Fiji, and the one to Honiara, payment of the balance purportedly due from the consignee to the first appellant - always an amount far greater than the total shown as owing and in fact paid by the consignee in respect of the genuine, old style invoice - was made by an unidentified person in cash, nearly always in New South Wales. On the first shipment to Fiji, that was an amount of $51,692 paid in cash on 25 May 1995; the learned trial judge thought it was unlikely that payment was by the consignee. The judge found that a payment of $100,000 made in cash on 6 October 1995 in respect of the second and third

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3 AR 1079-1164.

4 At AR 656.

5 At AR 660.

shipments to Fiji (those being two separate containers which went on the one ship, the *Barbican Star*) were a sham and not by the consignee. The judge likewise concluded that the payments in respect of the fourth and fifth shipments to Fiji - which also went on the one ship, the *Captaine Kermadec* - were payments with which Mr Wright was connected, and made the same finding about the payment of $30,000 for the sixth shipment to Fiji, paid on 29 January 2006, and the two cash payments made on 2 April 1996 and 11 May 1996 for the seventh shipment to Fiji. Regarding the payments for the Honiara shipments, the judge was satisfied that the balance payment purportedly made on 20 and 29 May 2006, in cash, were not made in respect of the goods listed on the new style invoice.

[58] The fact that such trouble had been gone to, to make cash payments purportedly paying large balance debts, showed how determined at least Mr Wright was to have the first appellant's books match the false invoices. Oddities about those balance payments included that the balance payment for the second container sent to Fiji was paid well before it was due, and for the third container before the ship had even arrived at the port in Fiji where that container was unloaded. The purported balance payments for the fourth and fifth containers sent to Fiji were paid three weeks before they were due, and in respect of the sixth container the balance was purportedly paid before the deposit; it so happened that the deposit matched the total owing on the genuine, old style invoice. On the seventh container which went to Fiji, the first purported payment of a large part of the balance was for cigarettes, paid on 2 April 1996, four days before the ship carrying the container left Australia; then came a genuine payment of a deposit exactly equal to the genuine invoice, made on 2 May 1996, followed nine days later by a purported payment of $62,427.20 in cash in New South Wales. There was no challenged to the judge's finding that those balance payments were not genuine; they show quite sophisticated dishonesty.

Purported orders

[59] So too did the purported record of orders being placed for those shipments of dutiable goods that were never sent. The learned judge found that various orders purportedly made by a "B Ram" or a "Balwant Ram", on behalf of the consignee, were a forgery. Those forgeries were the purported reason and authority for packing and sending the second and third, fourth, fifth, and seventh containers to Fiji. Mr Wright had issued the instructions resulting in the creation of both the false and the genuine invoices and packing slips, and he gave copies of the false invoices to the appellant company's customs broker, EDI Customs Brokers Pty Ltd, who obtained export clearance numbers for the appellant company for the goods described on those new style, false, invoices. Those documents bearing the export clearance numbers, unique to each container, recorded the number of the container in which the goods were packed, and the seal. The same container number and seal number appeared on both the false and the genuine packing lists prepared on Mr Wright's instructions.

Evidence by the appellants

[60] Both Mr Wright and Mr Bryce gave evidence, and the thrust of it from each was that the goods described in the new style or false invoices had been exported, in accordance with the documents providing an export clearance number and entering the goods for export from Australia. They both denied that the goods had simply been delivered into home consumption without being entered for home consumption, and accordingly without paying applicable customs or excise duty.

The learned judge rejected that evidence by each. Specifically, he rejected Mr Bryce's evidence that he had packed each container in accordance with the new style invoices and not the old. Mr Bryce had admitted in the pleadings that he knew that details were provided to Customs for export clearance for the goods listed in the relevant export entry numbers, and knew that no customs or excise duty had been paid in respect of those goods. The learned judge found that Mr Bryce had actually packed the containers in accordance with the contents of the old style invoices. That unchallenged finding and the pleadings made it well impossible to come to any conclusion other than that Mr Bryce was a knowing participant in a sophisticated and elaborate scheme to avoid paying that duty. He was the director/employee who did the packing, on the evidence, and he did not pack containers for export in accordance with new style invoices, although he knew that details had been provided to Customs for export clearance for the quite different goods listed in the documents with the unique export clearance number.

[61] The difference between the old style and new style invoices was always that the latter contained a description – identical to the document with the export clearance number – of a very large number of cases of spirits, usually in excess of 1,000. Mr Bryce must have noticed that he had not packed a container with 1,000 or more cases of spirits, but had packed a container with, usually, 50 to 80 cases only of spirits, and had packed the rest of the container not with spirits, but (usually) instead with cases of beer. In respect of shipment number 1, it was 1,199 cases of Frantelle Spring Water which he packed, not cases of spirits or beer. The prosecution proved that 1,500 cases of that spring water had been delivered to the premises of the first defendant just before that container was packed. Mr Bryce denied packing the container with spring water, but the judge disbelieved him, and that is what was in it and on the old style invoice.

[62] The judge drew the conclusion that Mr Bryce's denials of packing spring water were false, and that Mr Bryce must have known the true contents of each container when it left the first appellant's premises, containing in it the goods matching those in the old style invoices. The judge concluded that given that knowledge, Mr Bryce's persistent denials that the containers filled the goods listed on those invoices was not from forgetfulness, confusion, or inadvertence, but demonstrated a consciousness of his own and of the first appellant's guilt. The judge referred to *Edwards v The Queen* (1993) 178 CLR 193, and in my opinion it was open to the judge to infer that those were material lies told only because Mr Bryce well realised that admitting the truth would establish his guilt, because of his described admissions in the pleadings.

[63] Had it been a jury trial in which Mr Bryce made the same admissions in evidence as were in his pleadings, the learned trial judge would have been justified in directing the jury in terms of *Edwards*, regarding the false denials that the containers were packed as described in the old invoices and the false claims they were packed in accord with the new. His evidence included that the appellant company had a very small office, and packed on average only one or two containers per month. The conclusion that in those circumstances he falsely claimed to have packed what he admitted knowing had been approved for export, when he actually packed something quite different and not including much of what had been approved for export, would justify the conclusion by a jury that he lied because he would otherwise have to admit the ultimate conclusion. That was that the goods which he must have known had not been exported had in fact gone into home consumption,

without duty being paid on them. That conclusion would not follow at all from the fact that it had been averred by the prosecution, but because it was inevitable.

The use of averments

[64] The complaint made about the conviction of Mr Bryce included that the learned judge had relied on the averments, and had effectively reversed the onus of proof. The prosecution's Further Further Further Amended statement of claim began with the general allegation:

> "Pursuant to the provisions of section 255 of the *Customs Act 1901* and section 144 of the *Excise Act 1901*, the plaintiff says and avers and it is the fact that"

and then followed the rest of the pleading. Taking as an example the first shipment to Fiji, the pleading alleged at paragraph 33(a) that all three defendants knew that the container contained only the goods listed in the old style invoice, and pleaded in paragraph 33(b) that each defendant knew that details were provided to Customs for export clearance for the goods listed in the specified ECN export entry number. That pleading was admitted. In paragraph 33(c) the plaintiff pleaded that each defendant knew that the quantity of goods within that container was falsely stated in that export entry ECN. In paragraph 33(d) it was likewise pleaded that each defendant knew that excisable goods listed in the export entry number ECN had been moved, altered, or interfered with otherwise than in accordance with an authority under the *Excise Act*, in contravention of the s 61 of the *Excise Act*, and in paragraph 34 that each of the second and third appellants had aided and abetted, counselled or procured, or by way of act or omission was directly or indirectly concerned in the moving, altering, or interfering with otherwise and in accordance with the relevant authority under the *Excise Act* or *Customs Act* of those excisable and customable goods.

[65] It was also pleaded in paragraph 44 that each of the second and third appellants had likewise aided and abetted, counselled or procured et cetera, the breach by the first defendant of s 120(1)(iv) of the *Excise Act* (the offence of evasion of payment of excise duty) and the like pleading was made in paragraph 45 as to aiding and abetting the first defendant in the latter's pleaded breach of s 234(1)(a) of the *Customs Act*, an offence of evasion of payment of customs duty. Finally, the like pleading of aiding and abetting was made in paragraph 49 of the offence against s 234(1)(d) of the *Customs Act* and s 120(1)(vi) of the *Excise Act*, in respect of the offence by the first defendant pleaded against it of knowingly or recklessly of making a statement that was false or misleading in a material particular, in breach of s 234(1)(d) of the *Customs Act* and s 120(1)(6) of the *Excise Act*.

[66] The pleading in the statement of claim that Mr Wright and Mr Bryce had aided and abetted et cetera, was expressed in similar, general terms, for the offences against the *Excise Act* and the *Customs Act.* Those terms followed s 5 of the *Crimes Act 1914* (Cth), then in force,[6] and alleged that each of the second and third appellants aided and abetted, counselled or procured, or by way of act or omission was directly or indirectly concerned in or party to the relevant offence. That pleading did not refer to particulars of any particular act by Mr Bryce, and as against him pleaded an ultimate conclusion of fact and of law. It was really a pleading that by conduct

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6 Repealed by Act No 24 of 2001, Schedule 51.

otherwise proven against him he had intentionally encouraged and assisted in the various customs and excise offences.

[67] Those pleadings alleged states of mind in the second and third appellants and the pleadings in paragraphs 34, 44, 45, and 49 of the statement of claim alleging aiding and abetting et cetera by Mr Wright and Bryce are pleadings about the intent of Mr Wright and Mr Bryce. In accordance s 144(4)(a) of the *Excise Act* and s 255(4)(a) of the *Customs Act*, those pleadings as to the intent of those defendants should not have been pleaded as averments, and were not *prima facie* evidence of the existence of the states of mind averred. The learned trial judge should not have relied at all on those averments of intent necessarily made when asserting aiding and abetting et cetera.

[68] Unfortunately the learned trial judge did place some reliance, as against Mr Bryce, on those averments. The concluding paragraphs of the reasons for judgment given on 6 February 2006 are as follows:

> "[251] On the other hand, accepting that the charges against Labrador are proved, there is no evidence tending to exclude Mr Bryce's involvement. Although it was pleaded on his behalf that, if each container held the goods set out in the old-style commercial invoice, that occurred without his knowledge or consent, Mr Bryce did not suggest any hypothesis upon which he might not have been knowingly concerned in Labrador's conduct. That poses a difficulty for his case. The plaintiff pleaded in relation to each shipment that Mr Bryce knew at all material times that the container in question held only the goods listed in the relevant old-style commercial invoice. He also pleaded in relation to each shipment that Mr Bryce aided and abetted, counselled or procured or by way of act or omission was directly or indirectly concerned in moving altering or interfering with the relevant goods otherwise than in accordance with an appropriate authority and the making of the relevant false statements to Customs. The plaintiff submitted that these allegations constituted averments for the purposes of s 255 of the *Customs Act* 1901 and s 144 of the *Excise Act* 1901. If that is correct they provide prima facie evidence of the matters averred.
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> "[252] I see no difficulty in characterising the plaintiff's allegations in the statement of claim as averments. Indeed, the opening words of the statement of claim were, 'Pursuant to the provisions of section 255 of the *Customs Act* 1901 and section 144 of the *Excise Act* 1901, the plaintiff says and avers …'. It is true that to some extent they may be regarded as averring a mixed question of law and fact; but the only consequence of that is that they are to be regarded as prima facie evidence of the fact only. It is probably also true that as against Mr Bryce, some of them are averments of the ultimate issue; but that is of no consequence. The only unresolved question is whether they are averments for the purposes of the averment provisions. To be so the information, complaint, declaration or claim. In the present case they were contained in the statement of claim. Under the *Uniform Civil Procedure Rules*, that is a different document from the claim. Although Mr Hack made no submissions on this point, he expressly did not concede it.

> "[253] The phrase 'information, complaint, declaration or claim' embodies a mixed list of court forms. It reflects the variety of courts, superior and inferior and including courts of summary jurisdiction, in which customs prosecutions may be instituted. When originally enacted the phrase did not include 'complaint'; that word was added in 1923. Informations and complaints were (and are) initiating processes in courts of summary jurisdiction. A declaration was not an initiating process, but was the first pleading in a pre-judicature common law action in a superior court. 'Claim', on my limited research, does not seem to have had any particular technical meaning. I see no reason why it should be construed in the narrow sense in which it is used in the *Uniform Civil Procedure Rules*; and I note that this case was commenced by writ before those rules came into operation. The averment provisions were drafted long before those rules and have application throughout Australia. They display an intention to include a pleading (or at least the first pleading) among the documents which may contain an averment. When the High Court decided the separate questions earlier determined in this case, the applicability of the provisions to the statement of claim was assumed. The same assumption was made in *Chief Executive Officer of Customs v El Hajje*. In my judgment averments in the statement of claim are averments for the purposes of the averment provisions.
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> "[254] It remains to determine Mr Bryce's guilt or innocence. That must be decided on the basis of all of the evidence, taking the averment provisions into account. On that basis I am satisfied of his guilt on all charges beyond reasonable doubt."

[69] The learned judge accordingly did take the averment provisions into account both as part of the evidence and as part of the reasoning leading to the judge being satisfied beyond reasonable doubt that Mr Bryce was guilty of all charges pleaded against him. The learned judge erred in so doing in respect of the averments that Mr Bryce was a knowing party to the offences. The prosecution was perfectly entitled to aver the facts upon which it relied to invite the court to infer that conclusion of knowingly aiding or being a party, but was not entitled to aver it. But I am satisfied that the conclusion Mr Bryce was a party to the offences charged was unavoidable, independent of the averments. Mr Burbidge QC did not specifically submit that the judge had erred in relying on those particular averments of intent, and his complaint about the use of averments was a much more general one, and included the complaint that the learned judge had not identified the averments upon which the judge had relied in convicting Mr Bryce. But with respect, the learned judge did identify the averred matters, including that Mr Bryce was an intending aider, and that it follows that despite the absence of particular complaint about that matter, the judgment does reveal that error of law.

The proviso

[70] However, this is an appropriate case for the application of the proviso in s 668E(1A) of the *Criminal Code 1899* (Qld), regarding that error. That section is picked up by ss 68 and 79 of the *Judiciary Act 1903* (Cth), these being appeals against

convictions,[7] although not after verdicts of a jury. Applying the principles described in *Weiss v R* (2006) 223 ALR 662,[8] the evidence and particularly the unchallenged findings of the trial judge on that evidence reveals that Mr Bryce was proved beyond reasonable doubt to be guilty of the offences with which he was charged. No miscarriage of justice occurred because of his being convicted of them. The evidence properly admitted at the trial proved his guilt.

[71] Mr Burbidge conceded in his written reply to the respondent's written submissions that averments were available to the prosecution, but his oral submission nevertheless advanced the argument that the amended form of s 144 of the *Excise Act* applied at the trial, because that section was a procedural or facultative one. The argument, with respect, overlooked s 4 of the amending legislation amending s 144, referred to in the judgment of Williams JA herein. I agree with His Honour that the relevant form of s 144 was that before the amendment affected in 2001. While I agree with the submission by Mr Burbidge that the form of the pleading made it one capable of being oppressive, because of an extensive reliance on the power to aver, in fact the prosecution had led evidence as on a trial before a jury, establishing the pleaded facts by that evidence, or by agreement, and not by averment. The conclusions the learned judge drew on each count[9] uniformly declared that the only available inference was that the relevant goods were delivered for home consumption, and that that inference accorded with the plaintiff's averment to that effect. That did not constitute using the averments in a way contravening the observations in the joint judgment in *Chief Executive Officer of Customs v El Hajje* (2005) 79 ALJR 1289,[10] and in the result the averments did not give rise the abuse described in *R v Hush; ex parte Devanny* (1932) 48 CLR 487.

[72] Mr Burbidge also submitted for the appellants that s 61 of the *Excise Act*, the form it took in 1995 and 1996, did not provide for an offence punishable on conviction. But that submission also overlooked s 5 of the *Excise Act*, which was in the same terms as s 5 of the *Customs Act*, referring to "an offence" punishable on conviction by a penalty, and applying to s 61.

Appeals against sentence orders
General matters

[73] The primary focus of the sentence applications was the argument that it had simply not been open to the learned judge to impose periods of default imprisonment on Mr Wright and Mr Bryce, in the event either or both failed to pay the monetary penalties. Mr Burbidge also submitted that the financial penalties were excessive, in that the maximum (five times the duty evaded) was imposed for each such offence, and as well the learned judge had ordered payment of reparation to the Commonwealth of the amount evaded. Mr Burbidge argued that made a manifestly excessive monetary penalty, and the periods of default imprisonment ordered for Mr Wright and Mr Bryce were likewise manifestly excessive.

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7 See the discussion of ss 68 and 79 in *R v Drury* [1984] 1 Qd R 356; in *R v Hart; Ex parte Commonwealth DPP* [2006] QCA 039; CA Nos 166 of 2005, 167 of 2005, 24 February 2006, this Court applied the proviso to federal offences, and special leave was refused (*Hart v The Queen* [2006] HCA Trans 345; B10 of 2006, 21 June 2006).

8 [2005] HCA 81; M50 of 2005, 15 December 2005.

9 At [58] on the first Fiji shipment, at [90] on the second Fiji shipment, at [109] on the third Fiji shipment, at [126] on the fourth, [135] on the fifth, [152] on the sixth, [189] on the seventh shipment to Fiji, and [246] on the shipment to Honiara.

10 [2005] HCA 35; M171 of 2004, 3 August 2005.

[74] The learned judge had published the judge's careful and detailed reasons (running to 79 pages) on liability on 6 February 2006, and heard submissions on penalty on 3 March 2006, publishing the reasons and orders on penalty on 15 March 2006. Those reasons recorded that little evidence had been led at the sentence hearing, with neither Mr Wright nor Mr Bryce giving evidence.

[75] Early in those reasons the learned judge cited from the judgment of Kitto J in *L Vogel and Son Pty Ltd v Anderson* (1968) 120 CLR 157 at 164, as to the appropriate approach on sentence:

> "Not only are the defendants guilty of a sustained course of conscious wrongdoing, but the offences are in a field in which punishments for deliberate offences must be severe. The Customs laws represent the judgment of Parliament upon an important aspect of the economic organization of the community, and the object of the penal provisions is to make that judgment as effective as possible. It is important to remember that Customs officers have of practical necessity to rely extensively upon the information supplied to them by importers, for the flow of commerce could not be maintained if every importation had to be fully investigated. Moreover, detection of fraud is not always easy. No doubt ordinary conceptions of honesty and of civic responsibility suffice to ensure a great deal of fair dealing with the Customs, but for some people little seems to matter but fear of the consequences of discovery. The *Customs Act* makes those consequences potentially drastic. It is for the courts to make them, in suitable cases, drastic in fact, for otherwise traders who are not saved by qualms of conscience from willingness to defraud their fellow citizens may weigh the profits they hope for against the penalties they have cause to fear and find the gamble worthwhile."

[76] The learned sentencing judge in this matter noted that Kitto J imposed a penalty of four times the duty evaded, and that a subsequent Full Court wrote, when dismissing an appeal, that His Honour's reasons made it plain why penalties of that magnitude were imposed, and amply demonstrated the need for such penalties.[11] The learned judge then said of these offences that they were in the most serious category, listing by name other cases with which the judge had compared them, and then continued:

> "The conduct was planned and premeditated. It continued for more than a year. It involved eight separate shipments. It involved serious breaches of the trust which is necessarily accorded to those who are granted a licence to operate a bond store. It involved an elaborate attempt at deception, by the invention of a non-existent person, the forgery of a considerable number of documents and signatures and the enlistment of at least one accessory in Fiji. Labrador's customs agents were duped into assisting the operation of the scheme. It continued until the defendants were caught and would, I infer, have continued for longer had they not been caught."[12]

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11 *L Vogel and Son Pty Ltd v Anderson* (1968) 120 CLR 157 at 168.

12 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Others (No. 2)* [2006] QSC 40 at [8]; BS 904 of 1997, 15 March 2006.

The appellants did not challenge any of those descriptions.

[77] The judge then noted that since the appellant company's accounts gave no indication that that company was a beneficiary of the disposal of the dutiable goods without paying duty on them, which conduct had been engaged in by all three defendants for financial gain, the learned judge inferred that all of the illegitimate profit went to Mr Wright and Mr Bryce, and that it probably exceeded half a million dollars. The judge recorded that there was no evidence of any contrition on the part of the defendants, and that it was apparent they continued to instruct their counsel to reject the findings of guilt. The conduct of their case had involved systematic falsehood by Mr Wright, and blackening the characters of innocent people such as Fiji Customs officers, officers of the Solomon Island Customs, and another person. The defendants had also shown little willingness to co-operate in the administration of justice and had refused to be interviewed by Customs investigators. The duty avoided remained unpaid, and the defendants had given no evidence of what happened to the proceeds of sale of the dutiable goods on which duty was dishonestly evaded.

[78] The judge noted that Mr Wright was then 58 years old, married, with no criminal history, and had been involved in community and charity work. Mr Bryce was also 58 years old, also married and also had no criminal history. He was on medication for arrhythmia, hypertension, and stress, conditions apparently successfully managed.

Specific complaints on appeal s 182A and s 15A(1)

[79] Turning to the grounds of appeal against penalty, the following reasons do not necessarily deal with each ground separately; a number were argued together. Ground 1 contended that the learned judge erred in imposing sentences of imprisonment on Mr Wright and Mr Bryce; the appellants' written and oral submissions were that that power simply did not exist.

[80] At the time of commission of the offences, in the 12 months from mid-1995 to mid-1996, the *Customs Act*[13] and *Excise Act*[14] each provided that a person who contravened the relevant section (s 234(1)(a) of the *Customs Act* and s 120(1)(iv) of the *Excise Act*) was guilty of an offence punishable upon conviction by a penalty not exceeding five times the amount of duty evaded and not less than two times that amount. Neither Act directly provided in those sections for imprisonment for the offence of evasion of duty, or for imprisonment in default of payment of a penalty.

[81] The respondent contended that s 182A of the *Penalties and Sentences Act 1992* (Qld), providing for orders that offenders be imprisoned for failure to pay an ordered penalty, was picked up by s 15A(1) of the *Crimes Act*, as that section read after its amendment by the *Crimes Amendment (Enforcement of Fines) Act 1998* (Cth).[15] As so amended, it read:

> "15A(1) A law of a State or Territory relating to the enforcement or recovery of a fine imposed on an offender applies to a person convicted in the State or

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13 In s 234(2).

14 In s 120(2).

15 Act No 49 of 1998.

> Territory of an offence against a law of the Commonwealth.
>
> The law applies:
>
> (a) so far as it is not inconsistent with a law of
>
> the Commonwealth; and
>
> (b) with the modifications made by or under this section."

Section 8 of that amending Act Number 49 of 1998 provided:

> "The amendments of section 15A of the *Crimes Act 1914* made by this Act apply in relation to a fine regardless of whether it was imposed before, on or after the commencement of this Act."

The respondent submitted that s 15A accordingly applied as amended (assuming a "fine" included a "penalty" ordered under s 234(2) of the *Customs Act* and a "fine" ordered under s 120(2) of the *Excise Act*) in its form as amended in 1998, and not as it existed in 1995.

[82] The argument by Mr Burbidge on the appeal placed a good deal of weight on the form in which s 15A of the *Crimes Act* appeared as at 1995 to 1996; the section relevantly read at that time:

> "15A.(1) The laws of a State or Territory with respect to the enforcement and recovery of fines ordered to be paid by offenders, including laws making provision for or in relation to:
>
> (a) the awarding of imprisonment...
>
> shall, *so far as those laws are applicable and are not inconsistent with the laws of the Commonwealth*, apply and be applied to persons who are convicted in that State or Territory of Federal offences." [My italics].

[83] Mr Burbidge relied on the italicised words in his argument to this Court, in which he contended s 182A of the *Penalties and Sentences Act 1992* (Qld) was not applicable. An argument had been made to the learned judge below that s 182 of the Queensland Act did not apply because it was inconsistent with the law of the Commonwealth, namely s 247 of the *Customs Act*, which provides:

> "Every Customs prosecution in a court referred to in subsection 245(1) may be commenced prosecuted and proceeded with in accordance with any rules of practice (if any) established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with directions of the Court or a Judge."

[84] The learned judge gave careful consideration to that argument and concluded that no inconsistency was shown, and the appellants ultimately did not challenge that

conclusion on the appeal. Instead, the appellants' written submissions in reply on penalty[16] did not submit that s 247 of the *Customs Act* and s 182A of the *Penalties and Sentences Act* (Qld) were inconsistent, and accepted that their submissions related to applicability rather than inconsistency. But if s 15A(1) of the *Crimes Act* and s 182A of the *Penalties and Sentences Act* (Qld) apply to penalties imposed under s 234(2) of the *Customs Act*, then by reason of s 8 of the 1998 amending Act it is the amended version of s 15A(1) which applies, not the one in force at the time of the offence. The written submissions by the appellants did not deal with the amendment to s 15A effected in 1998, and Mr Burbidge submitted in his oral argument both that at the end of the day nothing much turned on the amendment, and that because the amendment had a substantive effect, the judge should have applied the 1995 version. As to that, s 8 of the 1998 amending Act provides otherwise, and the learned sentencing judge was correct in applying s 15A of the *Crimes Act* as amended in 1998.

[85] Section 182A provides as follows:

> "**182A Court may make orders for default payment of penalty**
> (1) A court that orders an offender to pay a penalty may also order that, if the offender fails to pay the penalty immediately within the time allowed by the court in its order, the offender is to be imprisoned for a term calculated under subsection (2)(a).
> The term of imprisonment –
> (a) must be –
> (i) the term that, in the Court's opinion, will satisfy the justice of the case; but
> (ii) not more than 14 days imprisonment for each penalty unit, or part of a penalty unit, that the offender was ordered to pay; and
> (b) must be served cumulatively with any term of imprisonment the offender is serving, or has been sentenced to serve, unless the court orders otherwise."

This Court held in *R v Booth* [1998] 1 Qd R 656 that by virtue of s 182A(2), default terms of imprisonment ordered in respect of fines imposed on the one occasion are to be served cumulatively. "Penalty" in the *Penalties and Sentences Act* (Qld) is defined in s 4 thereof to include "any fine, compensation, restitution or other amount of money", and would encompass the monetary penalties ordered under the *Customs Act* and the fines ordered under the *Excise Act*.

[86] Mr Burbidge accepted that s 182A of the *Penalties and Sentences Act* (Qld) answered the description of "A law of a State or Territory relating to the enforcement or recovery of a fine imposed on an offender", namely the first part of s 15A as amended. Logically, the concession would also apply to s 15A in its form as at 1995, namely that s 182A answered the description of a law of a State or Territory "with respect to the enforcement and recovery of fines ordered to be paid by offenders".

What is a "fine"?

[87] Section 3(2) of the *Crimes Act* provided, at all relevant times, that:

> "(2) In this Act, a reference to a fine includes a reference:

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16 At paragraphs 3 and 4.

(a) to a pecuniary penalty other than a pecuniary penalty imposed:
(i) under Division 3 of Part XIII of the *Customs Act 1901*; or
(ii) ..." [*The other exceptions are not relevant*].

[88] The monetary penalties imposed on these appellants were under Division 2 of Part XIII of the *Customs Act*, not Division 3; so if each was a pecuniary penalty, they answer the description of a "fine" in s 15A of the *Crimes Act*. Mr Burbidge submitted that the financial penalties ordered under s 234(2) of the *Customs Act*, for evasion of customs duty in contravention of s 234(1)(a) of that Act, were not "pecuniary" penalties. He submitted that the expression "pecuniary penalty" appeared in the *Customs Act* only in s 243B, in Division 3 of Part XIII of that Act, and nowhere else. But that submission, with respect, was inaccurate. Williams JA has quoted the provisions of s 5 of the *Customs Act* in his judgment in this matter, which section refers to "the penalty pecuniary or other" set out at the foot of a section, or subsection of a section, of that Act. In s 244 of the *Customs Act*, it is provided as follows:

"**244. Meaning of 'Customs prosecutions'**
'Customs prosecutions' are proceedings by the Customs:
(a) for the recovery of penalties under this Act, other than pecuniary penalties referred to in section 243B; or
(b) for the condemnation of ships, aircraft or goods seized as forfeited."

[89] Then in s 245 it is provided that:

"245. Institutions of prosecutions

(1) Customs prosecutions may be instituted by the CEO in the name of the office of the CEO by action, information or other appropriate proceeding:

(a) in the Supreme Court of a State;

(b) ...

(2) Where a Customs prosecution for a pecuniary penalty that, but for this section, would exceed 400 penalty units is instituted in a Court referred to in paragraph 1(d) or (e), the amount of that penalty that exceeds 400 penalty units shall be taken to have been abandoned." [*The Courts in 245(1)(d) and (e) are County or District or Local Courts*].

[90] Of necessity, the reference to a Customs prosecution for a pecuniary penalty in s 245(2) is a reference to a pecuniary penalty other than those referred to in s 243B in Division 3 of Part (XIII) of the *Customs Act*. Further, s 263 of the *Customs Act*, dealing with costs in Customs prosecutions, includes that:

"...any provision of a law of a State or Territory that, by virtue of an Act other than this Act, applies in relation to the recovery of pecuniary penalties under this Act apply in relation to the recovery of

> the amount of costs so awarded as if it were a pecuniary penalty adjudged to be paid by the party under this Act."

[91] That section assumes the operation of legislation such as s 15A of the *Crimes Act* and s 182A of the *Penalties and Sentences Act* (Qld). It also assumes that Customs prosecutions, as defined in the *Customs Act*, lend to pecuniary penalties imposed under that Act. There is therefore no substance in the argument that the financial penalties imposed on the appellants were not pecuniary penalties within the meaning of both the *Customs Act* and the *Crimes Act*, and accordingly "fines" within the meaning of the latter Act.

[92] At all times relevant to this matter the *Customs Act* has included s 261 which reads:

> "No person shall be twice imprisoned upon the same conviction but the suffering of imprisonment for non-payment of a penalty shall not release the penalty or affect the right of the Customs to collect the amount in any manner provided by this Act other than by imprisonment of the person convicted."

That section assumes the possibility of imprisonment for non-payment. The appellants suggested the operation of that section may have been limited to the exercise of the power once given in the *Customs Act* by s 242, repealed in 1983, which had given an express power to order imprisonment for between six months to two years for a second offence against the *Customs Act* "for which a pecuniary penalty is provided", such imprisonment to be either in lieu of or in addition to imposing the pecuniary penalty. The submission overlooks that since at least 1960 the *Crimes Act* has contained a provision similar in terms to s 15A. When originally inserted it was numbered 18A, but re-numbered by Act No 4 of 1990. So for nearly 50 years the *Crimes Act* has included a provision in terms of 15A, and in the *Customs Act* a provision in terms of 261, envisaging imprisonment in default of payment of penalties or fines.

"Convicted of offences"

[93] Mr Burbidge next submitted that the appellants were not convicted in Queensland of offences against a law of the Commonwealth. He argued that the expression "convicted" in s 15A(1) of the *Crimes Act* should be understood as describing a conviction after a criminal trial proceeding; it was not apt to include a conviction in a civil proceeding for a customs or excise offence. But both s 234(2) of the *Customs Act*, and s 120(2) of the *Excise Act*, begin with the provision that:

> "A person who contravenes sub-section (1) is guilty of an offence punishable upon conviction.....,"

and thereafter s 234(2) of the *Customs Act* makes provision for a "penalty" (so described), and s 120(2) of the *Excise Act* for a "fine" (so described), in each case not exceeding five times the amount of the duty evaded and not less than two times that amount. Since provision is expressly made in the *Customs Act* (ss 244 and 245; and in the *Excise Act* by ss 133 and 134) for customs and excise prosecutions for the recovery of penalties (as Williams JA has remarked in his judgment), it must follow that if Mr Burbidge is correct that the appellants have not been "convicted" of offences against the laws of the Commonwealth by reason of the successful Customs prosecutions against them, that they are also not liable to the imposition of any penalties or fines at all.

[94] But he has not argued that upon their convictions as declared by the learned judge on 6 February 2006, that the appellants were not liable to the penalties provided for in 234(2) of the *Customs Act* and 120(2) of the *Excise Act*. The appellants are only punishable by those penalties upon conviction of an offence, that being what s 234(2) of the *Customs Act* and s 120(2) of the *Excise Act* each provides. The appellants were expressly convicted by the judge of offences against the laws of the Commonwealth and for that reason, and that reason only, were liable to penalties calculated with regard to the amount of the duty evaded. Once Mr Burbidge impliedly conceded that liability to those (pecuniary) penalties, he necessarily conceded that his clients were persons convicted of offences against a law of the Commonwealth. Accordingly, s 15A(1) of the *Crimes Act* did apply to pick up s 182A of the *Penalties and Sentences Act* (Qld). That central plank of the sentence appeal should be dismissed.

The amount of the penalties

[95] The appellants submitted that the ordered amounts of the penalties for evading duty were excessive, but did not challenge any of the described findings of fact by the learned sentencing judge, other than the conclusion that what the judge described as the illegitimate profit probably exceeded half a million dollars. That conclusion was said to be speculation, but I disagree. The judge had calculated the duty evaded, of a little over $1 million, and had reasoned that market forces would probably ensure that the profit did not exceed the duty evaded, and that it was probably a good deal less than that. That reasoning seems entirely respectable, and there was no other purpose to the appellants' prolonged dishonesty than profiting by selling liquor and cigarettes without paying the appropriate customs or excise duty. Accepting that the profit was in the order the judge described is no more than the result that necessarily flows from convicting the appellants of evading the relevant duty. They did it to make a profit. On the findings made by the judge, the penalties ordered were an appropriate deterrent provided for in the legislation and necessitated by the sentencing principles described by Kitto J.

[96] The appellants' written submissions included arguments that the learned judge had erred in concluding that both punishment and enforcement (of the penalties) were separate purposes for which imprisonment in default of payment of a pecuniary penalty might be ordered. The judge so concluded in paragraph [52] of the reasons published when making the sentence orders, and the appellants submitted that conclusion showed an error. The judge had referred to the provisions of s 16C of the *Crimes Act*, which provides that before imposing a fine on a person for a federal offence, a court must take into account the financial circumstances of the person, in addition to any other matters that the court is required or permitted to take into account. The judge had considered the financial circumstances of each defendant, and had concluded that none of them would be able to pay even the minimum penalties which had to be imposed for the evasion offences. The first appellants' warehouse licence had been cancelled, Mr Wright owned no real property, and Mr Bryce had only a half share in his home and a 10 per cent share in a unit at Caloundra. The judge concluded that the information and evidence established that neither of Mr Wright nor Mr Bryce owned any other property of significant value, and that it was not the law that a fine, the amount of which plainly exceeded the capacity of the offender to pay it, was by that fact alone excessive.

[97] The learned judge had referred to the judgment of Mahoney JA in *Smith v The Queen* (1991) 25 NSWLR 1 at pages 23 and 24, and to the observation by that

learned judge that while Mr Smith, imprisoned for life, might be unaffected by any further sentence of imprisonment, it:

> "...is the significance to others of the present punishment which has a particular importance...what is done to him should both mark, clearly and emphatically, the community's view of his offence and (if it may) deter other possible offenders."[17]

That approach, as the learned judge in this matter observed, had been applied by Lloyd J in *Environmental Protection Agency v Ableway Waste Management Pty Ltd* [2005] NSWLEC 469.[18]

[98] As the learned judge in this matter observed, there was in fact no alternative punishment to a substantial pecuniary penalty. A minimum penalty had been provided for by both the *Customs Act* and the *Excise Act*, requiring pecuniary penalties in excess of $2 million to be imposed, irrespective of the financial circumstances of these appellants. I agree with the learned judge that the fact of those minimum penalties, the seriousness of the criminality of the offenders, and the weight which had to be given to general deterrence, left no scope for s 16C of the *Crimes Act* to perform any useful function.

Limits on default terms

[99] The appellants made a further argument in their written submission, that the powers of default imprisonment were limited to an aid in the enforcement of the payment of fines, and not available as an alternative form of punishment. That submission relied in part on remarks of Fisher J in *Reardon v Nolan* (1983) 74 FLR 309 at 313. The appellants also relied on the statements of Roberts-Smith J in *Djou v Commonwealth Department of Fisheries* (2004) 150 A Crim R 255,[19] in which His Honour considered other West Australian authorities, and agreed with the remarks of Owen J in *Perez v R* (1999) 21 WAR 470[20] at [47], that:

> "Quite clearly, the general rule is that a fine should not be imposed without an assessment of the means of the offender to pay it, and should not be imposed where the offender has no means to pay...The same general principle has statutory recognition, at least insofar as it relates to an inquiry concerns the means of the offender: *Crimes Act 1914* (Cth), s 16A(2)(m) and s 16C(1)."

[100] In that decision Roberts-Smith J also quoted from the judgment of Kennedy J in *Aruli v Mitchell* (unreported, FCt SCt of WA, Appeal Nos No 1090 of 1998, 1091 of 1998, 1092 of 1998, 31 March 1999, 31 March 1999) in which that judge wrote, regarding fines imposed on Indonesian fisherman who had no means of paying them, that:

> "...this Court held that a fine must reflect the gravity of the offence and must be imposed even though it is known that the offender will inevitably serve a default term of imprisonment."

[101] Roberts-Smith J went on to conclude, after an examination of other cases, that appropriate sentencing principles included that where imprisonment was not an available sentencing option, a fine and an immediate default period of imprisonment

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17 (1991) 25 NSWLR 1 at 23.

18 LEC No 40544 of 2004, 22 September 2005.

19 [2004] WASCA 282; SJA 1076 of 2004, 26 November 2004.

20 [1999] WASCA 282; CCA 158 of 1998, 22 November 1999.

was not to be imposed on the basis the offence merited imprisonment and the default period represented what would be an appropriate term of imprisonment for the offence; but also that where a fine is otherwise properly imposed, immediate imprisonment in default of payment may be ordered even though it is known that the offender will serve a default term (in that case, by reason of not being permitted to be in the jurisdiction in order to pay the fine by other means). That judgment recognises as proper what was the position here, and does not avail these appellants. That position is that the penalties ordered were properly imposed, and the immediate imprisonment in default of payment was ordered because of the inability of either Mr Wright or Mr Bryce to pay any of those properly imposed fines. They could hardly expect to get a benefit because of their having arranged their affairs so that they had no property against which execution could be levied. General and specific deterrence is relevant both when ordering pecuniary penalties and fixing the amount of those, and also when ordering default periods of imprisonment if those penalties are not paid, and in fixing the amount of those default terms.

[102] The appellants did not challenge the view that, if the ordered penalties were entirely unpaid – as appeared very likely – default periods totalling up to five years were appropriate, in view of their overall criminality. They did not suggest that any other, lesser, default periods for the particular offences, or in total, ought to have been ordered. Their argument was that it was wrong in principle to have regard to general deterrence when fixing periods of imprisonment in default, but I respectfully disagree. Any other result would give Mr Bryce and Mr Wright the advantage of escaping deterrent penalties because they had ensured they could not pay, or be forced to pay, pecuniary penalties.

Reparation orders

[103] The appellants complained that ordering reparation had the result that they were ordered to pay six times the duty unpaid, and therefore was excessive. But the judge had power to order penalties of five times the duty evaded and to order reparation as well, and the deterrent effect was a crucial part of the sentence. A reparation order is "in addition to the penalty, if any, imposed upon the person" (s 21B(1) *Crimes Act*). It is not itself a penalty forming part of an offender's sentence. I agree with the following statements by the learned judge:

> "Mitigating factors are almost nonexistent. The defendants' criminality is gross, extensive and unredeemed. In my judgment the maximum penalty is proportionate to it. That penalty is in the circumstance no more crushing than the minimum penalty. It is the penalty which should be imposed for each of the offences of evasion."[21]

[104] The appellants submitted that they had not had an opportunity to call evidence relevant to the imposition of the default periods, and were sentenced on the assumption that no part of the penalties would be paid. But the appellants had admitted that they could not pay even the minimum penalty that had to be imposed, and did not submit that they could pay any part of it. The appellants had the respondents' written submissions on penalty prior to the penalty hearing, and were not deprived of the opportunity to call evidence relating to the imposition of a jail term.

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21 [2006] QSC 40 at [31].

Part 1B argument

[105] The appellants argue that the learned judge did not apply Part 1B of the *Crimes Act* when imposing sentence, and in particular failed to apply s 19AB which relevantly provides:

> "**19AB** ..where:
>
> (a) a person is convicted of a federal offence, or of 2 or more federal offences at the same sitting; and
>
> (b) a court imposes on the person a federal life sentence, or a federal sentence that exceeds, or federal sentences that, in the aggregate, exceed 3 years;...
>
> The court must either:
>
> (d) fix a single non-parole period in respect of that sentence or those sentences; or
>
> (e) make a recognizance release order."

Section 19AB(3) allows the court, where satisfied that neither is appropriate, to decline to fix a non-parole period or make a recognizance release order, but 19AB(4) requires that a court must state its reasons for so deciding. The respondent argues that s 19AB had no application at all because the learned judge was not (directly) imposing federal sentences exceeding three years. The respondents, in fact, submitted that no sentences of imprisonment were imposed by the judge.

[106] In my respectful opinion, it is appropriate and just to look at the effect of the orders made, imposed on the assumption that there would be no payment of any pecuniary penalty. No time to pay was allowed, and the effect of the orders is that cumulative terms of imprisonment of nearly five years result. In those circumstances the learned judge did imposed federal sentences that exceed in the aggregate three years. A judge directly imposing aggregate terms totalling more than three years on these offences could not avoid fixing either single non-parole period, or making a recognizance release order, without giving reasons for doing that, and there seems no reason here for excluding the operation of a non-parole period or a recognizance release order. In *New South Wales v Commonwealth of Australia* (2006) 231 ALR 1,[22] the joint judgment quotes, at [228] of those reasons, from the judgment of Gleeson CJ in *Re Pacific Coal; Ex parte CFMEU* (2000) 172 ALR 257 at paragraph [29], where the Chief Justice wrote:

> "In law, as in life, there are many examples of things that can be done indirectly, although not directly. The true principle is that 'it is not permissible to do indirectly what is prohibited directly'."

Imposing aggregate terms totalling in excess of three years without either a non-parole period, a recognizance release order, or an explanation, is prohibited directly by Part 1B of the *Crimes Act*, and for that reason I consider it is not permissible to effect that result without one or other of those steps. In *R v Booth* [1998] 1 Qd R 656 this Court expressly adverted to the availability of parole for a "State" offender sentenced to cumulative default terms of imprisonment for non payment of fines.

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22 [2006] HCA 52; S592 of 2005, P66 of 2005, A3 of 2006, B5 of 2006, B6 of 2006, S50 of 2006, M21 of 2006, 14 November 2006.

[107] It was appropriate to make orders under 19AB. I would fix a single non-parole period of two and a half years in respect of each of those sentences, in accordance with the standard sentencing regime for offenders who contravene State laws.

[108] Accordingly, the orders that I would make are those proposed by Williams JA and order as well that in respect of the aggregate of the periods of default imprisonment imposed on 15 March 2006, that for each appellant this Court fixes a single non-parole period of two and a half years in respect of those aggregate periods of default. If it is necessary for warrants to issue for the arrest of the second and third appellants the respondent Chief Executive Officer of Customs should prepare a draft.