SUPREME COURT OF QUEENSLAND

CITATION:	*Comptroller-General of Customs v Inchcape Shipping Services Pty Limited* [2021] QCA 61
PARTIES:	**COMPTROLLER-GENERAL OF CUSTOMS** (applicant) **v** **INCHCAPE SHIPPING SERVICES PTY LIMITED** ACN 084 026 120 (respondent)
FILE NO/S:	CA No 286 of 2019 DC No 3509 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane – [2019] QDC 181 (Koppenol DCJ)
DELIVERED ON:	6 April 2021
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2020
JUDGES:	Fraser and Philippides and Mullins JJA
ORDERS:	**1. Grant the application for leave to appeal, limited to the applicant's contention that the primary judge erred in deciding that liability under s 236 of the *Customs Act* had not been established against the respondent because a "mistake of fact defence" under s 9.2 of the Commonwealth *Criminal Code* might be available to the masters.** **2. Dismiss the appeal.** **3. The applicant is to pay the respondent's costs of the application and the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – OTHER CASES – where the applicant prosecuted the respondent, a shipping agent, in the Magistrates Court for 132 offences under the *Customs Act* 1901 (Cth) – where the applicant applies for leave to appeal against the decision of the primary judge dismissing the applicant's appeal from the Magistrates Court – where the applicant relies upon three arguments for the contention that the primary judge erred in deciding that liability under s 236 of the *Customs Act* had not been established against the respondent – where the applicant argues under s 236 the respondent could be concerned in the

commission of an offence against the *Customs Act* even if a "mistake of fact defence" may be available to the master under s 9.2 of the Commonwealth *Criminal Code* – where the applicant argues that the applicant did not bear a legal burden of disproving in each case that the master was acting under such a mistake of fact – where the applicant argues that it was not open to the primary judge to infer that the master of each of the seven vessels mistakenly and reasonably believed that the respondent would submit the relevant reports in accordance with the *Customs Act* – where the respondent opposed the grant of leave to appeal upon the basis that the order by the primary judge dismissing the appeals was in any event correct, because the primary judge erred in deciding that the reference in s 236 to a person concerned in the commission of any offence did not require proof of intention – whether leave to appeal should be granted in these circumstances

TAXES AND DUTIES – PENAL PROVISIONS UNDER CUSTOMS LEGISLATION – OFFENCES – AIDERS AND ABETTORS – where the applicant prosecuted the respondent, a shipping agent, in the Magistrates Court for 132 offences under the *Customs Act* 1901 (Cth) – where the offences were in relation to seven ships' operators failures to make reports to the Department by the specified time, on various dates between 2014 and 2017, as required by ss 64, 64ACB and 64ACA – where the masters were not prosecuted – where the masters had retained the respondent as the shipping agent for the purpose of complying with the reporting obligations of the masters – where each ship's master had provided the necessary reports to the respondent in time for the respondent to attend to compliance with the master's statutory obligations – where the applicant alleged that the respondent was deemed to have committed the offences actually committed by the ships' masters by s 236 of the *Customs Act* – where the magistrate found the respondent not guilty of each charge – where the applicant appealed to the District Court – where the primary judge dismissed the appeal – where the primary judge held that the second

Acts Interpretation Act 1901 (Cth), s 2B
Corporations Act 2001 (Cth), s 1322, s 1324(1)
Criminal Code (Cth), ch 2
Criminal Code (Qld), s 7, s 8
Criminal Code (WA), s 7, s 8
Customs Act 1901 (Cth), s 4, s 5, s 5AA, s 64, s 64ACA, s 64ACB, s 64ACD, s 229A, s 236, s 243A, s 244
Customs Consolidation Act 1876 (UK), s 186
Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001 (Cth)
Prevention of Smuggling Act 1845 (UK), s 46
Secret Commissions Act 1905 (Cth), s 10

Trade Practices Act 1974 (Cth), s 75B, s 82

Ashbury v Reid [1961] WAR 49, cited
Attorney-General v Robson (1850) 5 Ex 790; (1850) 155 ER 346; [1850] EngR 826, cited
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161; [2003] HCA 49, cited
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors [2006] QSC 4, cited
Chief Executive Officer of Customs v Lin [2007] WASC 314, cited
Clarke v Chief Executive Officer of Customs (2005) 191 FLR 348; [2005] SASC 165, distinguished
Giorgianni v The Queen (1985) 156 CLR 473; [1985] HCA 29, applied
Pickett v Western Australia (2020) 94 ALJR 629; [2020] HCA 20, cited
Poyser v Commissioner for Corporate Affairs [1985] VR 533; [1985] VicRp 53, distinguished
R v Barlow (1997) 188 CLR 1; [1997] HCA 19, cited
R v Beck [1990] 1 Qd R 30; [1989] QSCCCA 180, cited
R v Buckett (1995) 126 FLR 435, distinguished
R v Li [2020] QCA 39, distinguished
Re ICandy Interactive Limited (2018) 125 ACSR 369; [2018] FCA 533, distinguished
Thornton v Mitchell [1940] 1 All ER 339, distinguished
Tran v The Commonwealth (2010) 187 FCR 54; [2010] FCAFC 80, distinguished
Yorke v Lucas (1985) 158 CLR 661; [1985] HCA 65, cited

COUNSEL: T Begbie and K McGree for the applicant
R O'Gorman and D Caruana for the respondent

SOLICITORS: Australian Government Solicitor for the applicant
Thynne + Macartney Lawyers for the respondent

[1] **FRASER JA:** The *Customs Act* 1901 (Cth)[1] imposes obligations upon the operator of a ship or aircraft in respect of a voyage or flight to Australia from a place outside Australia to report specified information to the Department within a specified time. The applicant prosecuted the respondent, a shipping agent, in the Magistrates Court for 132 offences under the *Customs Act* concerning seven ships' operators' failures to make reports to the Department by the specified time (which in these cases was 96 hours before an estimated time of arrival in the port) on various dates between 2014 and 2017. The operator of each of the seven ships was the ship's master.[2] For six of the seven ships the master failed within the specified time to report each member of the crew who would be on board the ship at the time of its arrival at the port as required by s 64ACB. For one of those six ships the master failed within the specified time to report the impending arrival of the ship as required by s 64. For another one of those six ships and for the seventh ship the master failed within the

1 Unless otherwise stated, references to the *Customs Act* in these reasons are to Compilation No. 142 of the *Customs Act* 1901 (Cth) as amended and in force on 1 January 2017.

2 *Customs Act*, s 4 (definition of "operator").

specified time to report each passenger who will be on board the ship or aircraft at the time of its arrival at the port or airport as required by s 64ACA.

[2] Each of the offences allegedly committed by the masters is an offence of "strict liability",[3] with the result that in any prosecution of the masters it would not be necessary for the applicant to prove any "fault element" (such as intention or recklessness) but a "mistake of fact defence" would be available.[4]

[3] The masters were not prosecuted. Each of them had retained the respondent as the shipping agent for the purpose of complying with the reporting obligations of the masters. Each ship's master had provided the necessary reports to the respondent in time for the respondent to attend to compliance with the master's statutory obligations.

[4] The respondent was prosecuted for the alleged offences. The applicant alleged that the respondent was deemed to have committed the offences actually committed by the ships' masters by s 236 of the *Customs Act*. Section 236 provides:

> "For the purposes of a Customs prosecution (within the meaning of section 244), whoever aids abets counsels or procures or by act or omission is in any way directly or indirectly concerned in the commission of any offence against this Act shall be deemed to have committed such offence and shall be punishable accordingly."

[5] The magistrate found the respondent not guilty of each charge.

[6] At the trial in the Magistrates Court the applicant argued that the expression "whoever … by act or omission … in any way directly or indirectly concerned in the commission of any offence" did not require proof that the person who did the act or omission did so with intent. The applicant argued that by application of the Commonwealth *Criminal Code*, any required state of mind was not intention but was instead recklessness. The respondent argued that s 236 required proof that the person who did the act or omission knew the essential facts constituting the commission of the offence by the master and intended to participate in that offence. In relation to the factual issue, the respondent argued that the agreed facts and the evidence in relation to each offence revealed that its omission to make the required reports was accidental or inadvertent.

[7] The factual issue is sufficiently illustrated for present purposes by the magistrate's summary of the agreed facts and evidence relating to two of the ships:

> "The evidence in relation to the ship Green Lake is set out in the agreed statement of facts in exhibit 8. James Baudelin was the master of the ship which had sailed from Japan intending to arrive at Townsville on the 18th of September 2014. On the 10th of September, the defendant emailed Mr Baudelin requesting the prearrival report, form 13, and the crew report, form 3B. Mr Baudelin supplied the requested forms on 10 September. There were 22 crew and two passengers. On the 15th of September, the defendant emailed the crew report and the prearrival report to Customs. The crew report

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3 See *Customs Act*, ss 64ACD(2) – (4) (in relation to ss 64ACB(3) and 64ACA(5)), ss 64(13) - (14) (in relation to s 64(5)).

4 *Criminal Code* (Cth), s 6.1(1).

> was required to be made to Customs between 8 September and 14 September.
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> On the 23rd of September 2014, the defendant by its representative was interviewed by Customs. The tape is exhibit 7B. The explanation for the late delivery of the form was human error. The representative said an email was sent on the 13th of September to the shipping line which due to human error did not copy in Customs, and it was picked up on the 15th of September that Customs had not been copied in on the 13th and the document was emailed to Customs on the 15th of September. The representative of the defendant denied any intent to do the wrong thing.
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> The evidence in relation to the ship Laurel Ace is set out in the agreement statement of facts, exhibit 10. Yu Long Zhu, Y-u L-o-n-g Z-h-u, was the master of the Laurel Ace, which had sailed from Malaysia, intending to arrive at Townsville on the 7th of June 2015. The ship arrived on the 8th. On the 31st of May, Zhu Yu Long provided the crew report, form 3B, and form 13 to the defendant. On 1 June 2015, the defendant notified Customs of the impending arrival of the Laurel Ace. On the 5th of June, the defendant emailed Customs a completed crew report, form 3B, and a prearrival report, form 13. The crew report, form 3B, was required to be made to Customs between 28 May and 3 June.
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> On 10 June 2015, the defendant by its representatives were interviewed by Customs. The tape of the interview is exhibit 9B. The explanation offered by Chloe Larson was that she was … in charge of the ship on behalf of the defendant. Ms Larson went away over the weekend, and when she came back late Monday, her colleague, Brendan Gibson, had taken over looking after the ship. Mr Gibson had marked the forms 13 and 3B as having been sent. On Friday the 5th of June, Mr Gibson was going through the secondary checklist and realised that he hadn't sent the required forms. The failure to supply the forms by the required time was described as unintentional human error."

[8] The magistrate found in respect of each of the complaints that the prosecution failed to prove that the facts known to the defendant were such that they intended the commission of the principal offence. The magistrate accepted the explanations for the failures to provide the necessary reports and the evidence did not justify a reasonable inference that a consequence of failings in the defendant's internal system was that the defendant's intention was not to ensure that Customs receive the reports. The magistrate was also not satisfied that matters raised by the prosecutor justified an inference in respect of any of the individual complaints that the relevant employees of the defendant acted with the requisite intention. The magistrate also rejected the applicant's argument that it had proved that the respondent was reckless.

[9] The applicant appealed to the District Court. There were two grounds of appeal. The first ground contended that the magistrate erred in interpreting "the second limb of s 236" as requiring the prosecution to prove intention. (The applicant described the words "or by act or omission is in any way directly or indirectly concerned in" as the "second limb", the "first limb" being the words "aids abets counsels or procures".) The second ground contended that the magistrate erred in finding on the

facts that the respondent's failure to submit the relevant forms within the required time was not reckless.

[10] The primary judge decided that the second limb of s 236 did not require proof of intention or recklessness, but held that the appeal should be dismissed because the applicant could not have excluded a "mistake of fact defence" by the master under s 9.2 of the Commonwealth *Criminal Code*.

[11] The applicant applies for leave to appeal against the primary judge's decision. The applicant relies upon three arguments for the contention that the primary judge erred in deciding that liability under s 236 of the *Customs Act* had not been established against the respondent. The applicant argues:

1. Under s 236 the respondent could be concerned in the commission of an offence against the *Customs Act* even if a "mistake of fact defence" may be available to the master under s 9.2 of the Commonwealth *Criminal Code*.

2. The applicant did not bear a legal burden of disproving in each case that the master was acting under such a mistake of fact.

3. It was not open to the primary judge to infer that the master of each of the seven vessels mistakenly and reasonably believed that the respondent would submit the relevant reports in accordance with the *Customs Act*.

[12] There is a substantial argument that the primary judge erred in the way contended for in the applicant's first argument. The primary judge's decision upon that question has wide ranging implications for Customs prosecutions throughout Australia. The respondent opposed the grant of leave to appeal upon the basis that the order by the primary judge dismissing the appeals was in any event correct, because the primary judge erred in deciding that the reference in s 236 to a person concerned in the commission of any offence did not require proof of intention. The primary judge's decision upon that question involves a question of law that also has substantial implications for the conduct of Customs prosecutions. In these circumstances it is appropriate to grant leave to appeal upon the first ground.

[13] Leave should not be granted to permit the applicant to advance the second argument on appeal. It does not add anything of substance to the first argument. Nor should leave be granted to advance the third argument on appeal. No important principle is raised by the third argument, which concerns only the application of the law to the evidence in a way which resulted in acquittals.

Meaning of "the commission of any offence against this Act" in s 236 of the *Customs Act*

[14] An effect of the primary judge's decision is that the expression in s 236 "the commission of any offence against this Act" required proof in the case against the respondent that the ships' masters were liable to be convicted and punished for their contraventions of the statutory reporting obligations. In this respect, the primary judge noted that in *Giorgianni v The Queen*[5] Mason J (as he then was) said, citing *Thornton v Mitchell*,[6] that it "is essential to conviction on the basis of secondary party … (a) that the person charged aids, abets, counsels or procures the

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5 (1985) 156 CLR 473 at 491.

6 [1940] 1 All ER 339.

commission of the misdemeanour and (b) that the misdemeanour is actually committed".[7] An equivalent of the second requirement appears in the reference to "the commission of any offence" in s 236 of the *Customs Act*. The issue in this matter, however, concerns what is meant by that expression. No similar issue arose in *Thornton*, in which an appeal against the conviction of a bus conductor as a second party to the bus driver's misdemeanour of driving without due care and attention was allowed upon the ground that the driver had not driven without due care and attention.

[15] It is necessary to construe the *Customs Act* to decide what is meant by the relevant expression in s 236. That requires attention to the statutory text understood in its statutory context and with regard to the statutory purposes.

[16] Section 236 applies only for the purposes of "Customs prosecutions", a term which is defined in s 244 (in Part XIV) to mean "proceedings for the recovery of penalties under [the *Customs Act*], other than pecuniary penalties referred to in section 243B; or for the condemnation of ships, aircraft or goods seized as forfeited".

[17] In *R v Barlow*[8]and *Pickett v Western Australia*[9] the High Court discussed the meaning of "offence" in ss 7 and 8 of the *Criminal Code* (Qld) and the *Criminal Code* (WA) respectively. Those provisions impose criminal liability upon persons who have not engaged in the elements of conduct (acts or omissions) which would attract criminal liability in defined circumstances. In *R v Barlow*[10] Brennan CJ, Dawson and Toohey JJ referred to possible meanings of "offence" in the following passage:

> ""Offence" is a term that is used sometimes to denote what the law proscribes under penalty and sometimes to describe the facts the existence of which render an actual offender liable to punishment. When the term is used to denote what the law proscribes, it may be used to describe that concatenation of elements which constitute a particular offence (as when it is said that the Code defines the offence of murder) or it may be used to describe the element of conduct (an act or omission) which attracts criminal liability if it be accompanied by prescribed circumstances or if it causes a prescribed result or if it be engaged in with a prescribed state of mind (as when it is said that a person who *strikes another a blow* is guilty of the offence of murder if the blow was unjustified or was not excused, if death results and if the blow is struck with the intention of causing death)…"

[18] In both cases the High Court decided that the term "offence" did not describe the facts the existence of which render an actual offender liable to punishment. That term instead denoted what the law proscribes under penalty. Those cases focussed upon the choice between the two available meanings of the term "offence" when it is used to denote what the law proscribes under penalty. In *Pickett* the High Court

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7 *Giorgianni* concerned s 351 of the *Crimes Act* 1900 (NSW), which is not materially distinguishable from the provision for secondary liability in s 11.2(1) of the Commonwealth *Criminal Code*. Mason J (as he then was) considered that provisions such as s 351 were declaratory of the common law and procedural in nature: (1985) 156 CLR 473 at 490.

8 (1997) 188 CLR 1.

9 (2020) 94 ALJR 629.

10 (1997) 188 CLR 1 at 9.

endorsed the resolution in *Barlow* "in favour of the view that it means the "element of conduct (an act or omission) which attracts criminal liability if it be accompanied by prescribed circumstances or if it causes a prescribed result or if it be engaged in with a prescribed state of mind"."[11]

[19] It is not necessary in this application to decide whether one of those views, and if so which, should be adopted in this application. Although some provisions of the *Customs Act* create offences for which both conduct and intention are specified as elements, the specified elements of the offences under consideration in this application are confined to conduct and, as I will explain, the meaning of "offence" in the *Customs Act* is not influenced by the provisions of the Commonwealth *Criminal Code* concerning criminal responsibility.

[20] The question is whether the reference in s 236 to "offence" in the expression "the commission of any offence" denotes what the law proscribes under penalty or whether it describes the facts the existence of which render an actual offender liable to punishment. The statutory language compels the former meaning to the exclusion of the latter. That is so because, with only one exception, the relevant statutory provisions relating to the offences to which s 236 is potentially applicable clearly distinguish the commission of the offence from conviction for the offence, the matters amounting to the commission of the offence being specified in the relevant offence-creating provisions.

[21] The distinction I have mentioned is made in two different ways. In one category of offences, the distinction is made in terms by the language of the offence-creating section or subsection. The provisions creating the strict liability offences in issue in this application are within this category. The relevant reporting obligations are imposed by ss 64, 64ACA and 64ACB. Those provisions impose obligations upon the operator of a ship in respect of a voyage or flight to Australia from a place outside Australia to report specified information to the Department within a specified time. The offences are created by s 64(13) (for contravention of s 64) and s 64ACD(2) (for contravention of s 64ACA or s 64ACB.) Each of s 64(13) and s 64ACD(2) provide that an operator of a ship or aircraft "who contravenes" the section imposing the reporting obligation "commits an offence punishable, on conviction, by a penalty not exceeding 60 penalty units".

[22] In the remaining category of offences, the applicable section or subsection includes at its foot a statement of the penalty, after providing to the effect either that, if a person engages in specified conduct (or does so intentionally) the person commits an offence, or that a person must or must not engage in specified conduct (or must not do so intentionally). In this category of offences, the distinction I have mentioned is made by s 5 of the *Customs Act*. Section 5, which applies where a "penalty, pecuniary or other, [is] set out … at the foot of a section … or subsection" (in the latter case, only where the penalty is not also set out at the foot of that section), provides that "the penalty … 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."[12]

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11 (2020) 94 ALJR 629 at 643 [66] and 641 [54] quoting *R v Barlow* (1997) 188 CLR 1 at 9.

12 There is an equivalent provision in *Crimes Act* 1914 (Cth) s 4D(1).

[23] When the *Customs Act* was enacted that distinction was made in relation to all of the offences that might be the subject of a Customs prosecution, because all such offences attracted the application of s 5, which was then materially in its current form. The respondent referred the Court to Hayne J's discussion of the history of the enactment of the *Customs Act* in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*.[13] As the respondent submitted, the provisions to which s 5 applied in the *Customs Act* as enacted merely prescribed statutory norms and specified a penalty applicable in the event of a contravention. Various offences expressed in a form which do not attract the application of s 5 were added by subsequent amendments. All but one of those offences maintain the distinction, although not in uniform language. Section 114E(3), which was inserted by Act No. 95 of 2001, does not distinguish the offence from a conviction or punishment for that offence: "The penalty for an offence against subsection (1) is …". The omission to make the distinction in one offence does not detract from the significance of the language of the *Customs Act* as enacted and the language of all but one of the relevant provisions in the relevant version of the *Customs Act*.

[24] Consistently with the language of s 5, in each of the offence-creating provisions applicable in this case, s 64(13) and s 64ACD(2), "contravenes" connotes an act or omission that infringes the relevant statutory obligation. That ordinary meaning of the word is also consistent with the inclusive definition in s 2B of the *Acts Interpretation Act* 1901 (Cth) of "contravene" that it "includes fail to comply with".

[25] The effect of the provisions to which I have referred is that a person commits an offence against one of the provisions relevant in this application if the person does an act prohibited by the relevant provision or omits to do an act the person is obliged to do by the relevant provision. Any additional requirement for a conviction and punishment beyond the act or omission is not comprehended within the expression "the commission of any offence" in s 236 of the *Customs Act*.

[26] The *Criminal Code* regulates criminal responsibility for Commonwealth offences generally, but the *Code* is modified in its application to *Customs Act* offences. In the context of the *Customs Act*, the word "conviction" refers to the "adjudication by the court that the defendant has contravened a provision of the Act".[14] For offences under the *Customs Act* of the relevant kind, convictions may be sought in Customs prosecutions. In relation to responsibility for such offences, s 5AA(1) of the *Customs Act* applies Chapter 2 of the Commonwealth *Criminal Code* for an offence against the *Customs Act*, subject to s 5AA(2). By s 5AA(2), Parts 2.1, 2.2 and 2.3 of the Commonwealth *Criminal Code* apply, Parts 2.4, 2.5 and 2.6 do not apply, and a reference to "criminal responsibility" in Chapter 2 of the Commonwealth *Criminal Code* is taken to be a reference to "responsibility".

[27] Section 5AA(3) provides that the section "is not to be interpreted as affecting in any way the nature of any offence under this Act, the nature of any prosecution or proceeding in relation to any such offence, or the way in which any such offence is prosecuted, heard or otherwise dealt with." In any event, the applied provisions are consistent with the meaning of "offence" in s 236 which I have mentioned. The parts of the Commonwealth *Criminal Code* as applied in Customs prosecutions

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13 (2003) 216 CLR 161 at 195 [108].

14 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 206 [137] (Hayne J).

distinguish an "offence" from "responsibility" for the offence, such as is required for conviction and punishment for the offence. Part 2.1 contains general provisions about the purpose and application of Chapter 2 of the Commonwealth *Criminal Code*. The purpose is expressed in s 2.1 as being "to codify the general principles of criminal responsibility under laws of the Commonwealth". The same section states that Chapter 2 "contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created."[15] Part 2.2 of the Commonwealth *Criminal Code* implements the general purpose of Chapter 2 by identifying the elements of an offence ("physical elements" and "fault elements") that must be proved in order for a person to be found guilty of committing an offence. The distinction between an "offence" and "criminal responsibility" for an offence (or "responsibility" for an offence that may be the subject of a Customs prosecution) is also clearly made in Part 2.3, which describes the circumstances in which there is no criminal responsibility for an offence. Many provisions of this Part provide in terms that a person "is not criminally responsible for an offence" in specified cases, including s 9.2 (which allows for the defence of mistake of fact in relation to a strict liability offence). Conversely, other provisions state that a person "can be criminally responsible for an offence" in certain circumstances.

[28] As to the statutory purpose, it is sufficient to record that the evident purpose of s 236 would not be fulfilled by a construction under which the result of a ship operator's conventional engagement of a shipping agent to fulfil the operator's *Customs Act* obligations would be that, however culpable the shipping agent was for not attending to the fulfilment of those obligations, it could not be convicted under s 236 merely because, as might be expected in the usual case, the ship operator reasonably believed that the shipping agent had attended to the fulfilment of the operator's obligations.

[29] The applicant drew to the Court's attention statements in three cases which arguably support the primary judge's conclusion: *R v Buckett*,[16] *Clarke v Chief Executive Officer of Customs* (applying *Buckett* in the context of the *Customs Act*),[17] *R v Li*[18] (referring to *Buckett* and *Clarke*), and *Tran v The Commonwealth*.[19] The relevant statements in *Buckett* are to the effect that to obtain a conviction of an alleged second party to an offence in contravention of s 82 of the *Proceeds of Crime Act* 1987 (Cth) in accordance with s 5 of the *Crimes Act* 1914 (Cth) the Crown must establish not only the facts constituting the offence required to be proved in the prosecution case but also that the principal offender would not have succeeded in establishing the statutory defence to the charge (that the principal offender had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised directly or indirectly from some form of "unlawful activity"). In *Clarke*, Doyle CJ followed *Buckett* upon this point, whilst indicating that although he was prepared to proceed on that basis there may be an argument to the contrary. The reasoning in *Buckett* concerned a very different statutory scheme. That reasoning should not be regarded as applicable in the resolution of the issue in this application. *Buckett* and *Clarke* were cited in *Li* for the proposition that s 7(1) of

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15 Section 2.2(1) applies Chapter 2 to all offences against the Commonwealth *Criminal Code* and s 2.2(2) provides that subject to s 2.3 (which is not relevant for present purposes), Chapter 2 applies on and after 15 December 2001 to all other offences.

16 (1995) 126 FLR 435, 440-442.

17 (2005) 191 FLR 348 at [58].

18 [2020] QCA 39 at [152] – [154].

19 (2010) 187 FCR 54 at 80-81 [104]-[106].

the *Criminal Code* (Qld) required a jury to be directed that they had to be satisfied that the principal offender was guilty of the offence. That does not assist the applicant. The passage cited from Rares J's judgment in *Tran* does not concern the present issue.

[30] At least so far as concerns the relevant strict liability offences for which the elements expressed in the *Customs Act* are confined to conduct, the parts of the Commonwealth *Criminal Code* applied in Customs prosecutions by s 5AA of the *Customs Act* accord with the construction of s 236 of the *Customs Act* derived from the text of that provision understood in its context, that "offence" in the expression "the commission of any offence" refers to the act or omission by which the relevant obligation was contravened. The question whether any person is liable to be convicted or punished as the actual offender has no bearing upon the question whether liability may be established under s 236 of the *Customs Act*. In particular, the defence of mistake of fact, which could potentially be relevant only to the question whether the actual offender might be liable to be convicted and punished, is irrelevant to the application of s 236.

[31] I conclude that, in relation to the strict liability offences relevant in this appeal, the masters' omissions to report as required by the *Customs Act* amounted to "the commission of any offence against this Act" in terms of s 236.

Meaning of "by act or omission … directly or indirectly concerned in the commission of any offence against this Act" in s 236 of the *Customs Act*.

[32] The primary judge considered that the meaning of the second limb of s 236 was clear and unequivocal and nothing in the wording of s 236 could support a principled conclusion that intention or recklessness was a pre-condition of applicability of the section. The primary judge contrasted the second limb of s 236 with the extension in s 1324(1) of the *Corporations Act* 2001 (Cth) of liability beyond "aiding, abetting, counselling or procuring" to "being in any way, directly or indirectly, *knowingly concerned* in, or party to, the contravention by a person of this Act". The primary judge reasoned that "If Parliament had wanted the accessory equivalent in the [*Customs Act*] … to have had the additional requirement of *intention*, it could easily have included the adverb "intentionally" – which it did not."

[33] The applicant relies upon that reasoning and makes the same point with reference to other statutory provisions that impose liability of various kinds upon a person "knowingly concerned in" rather than merely "concerned in". Before discussing the significance of the absence of the word "knowingly" from s 236 it is appropriate to consider the ordinary meaning of the words in that section and the influence upon its construction of context, including the statutory history.

[34] The applicant argues that the words "by act or omission" reveal that liability under the relevant part of s 236 depends only upon an act or omission, thereby excluding any requirement of knowledge or intention. It is submitted that the section therefore requires an assessment only of the relationship between conduct of the alleged second party and the commission of the offence by another person to decide whether the alleged second party's acts or omissions made that person "directly or indirectly concerned in" the commission of the offence.

[35] A similar submission might once have been made about the literal meaning of "aids" or "abets", but *Giorgianni* confirmed that, at common law and in the statutory provision considered in that case, those words "and the synonyms which express their meanings – eg. help, encourage, advise, persuade, induce, bring about by effort – indicate that a particular state of mind is essential before a person can become liable as a secondary party for the commission of an offence, even if the offence is one of strict liability".[20] It is not necessary that the alleged second party knew that what the actual offender was doing or was about to do amounted to an offence, but it is necessary that the alleged second party knew all of the essential facts which constituted the commission of the offence and intentionally aided, abetted, counselled or procured the relevant acts or omissions amounting to the commission of the offence.[21]

[36] The circumstance that s 236 applies only in relation to proceedings for the recovery of penalties under the *Customs Act* and proceedings for the condemnation of ships, aircraft or goods seized as forfeited[22] does not avoid the difficulty for the applicant's construction, articulated in *Yorke v Lucas*,[23] that the words "aids", "abets", "counsels" and "procures" were "taken from the criminal law where they are used to designate participation in a crime as a principal in the second degree or as an accessory before the fact", thereby requiring intent with knowledge of the essential matters which go to make up the offence. There is at least as much reason for adopting the same construction of the same words in s 236 of the *Customs Act* in a Customs prosecution, even if it is prosecuted as a claim for a civil penalty, as there is in a civil claim of the kind in issue in *Yorke v Lucas*.

[37] This statutory history supports that conclusion. When the *Customs Act* was enacted in 1901, s 236 commenced with the word "Whoever", and it did not include the words that now limit its application to a Customs prosecution. From enactment until the commencement of the amending legislation applying the *Criminal Code*, s 236 applied not only in relation to Customs prosecutions, but also in relation to all other offences, including indictable offences for which imprisonment could be imposed upon conviction. Offences of the latter kind have been in the *Customs Act* since its enactment. Section 236 is not so expressed as to be capable of differential application according to the nature of the offence being prosecuted.

[38] It is evident that no policy decision was made by which the meaning to be attributed to s 236 would be altered after the *Criminal Code* was applied by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth). The purpose of the introduction of that legislation, so far as it is relevant to the present point, was explained in the following passage in the Explanatory Memorandum:

> "***Item 2 – Application of the Criminal Code***
>
> 595. Proposed section 5AA differs from equivalent provisions in other Acts because of the unusual nature of most offences in the *Customs Act 1901*. While there are some offences that are purely criminal in nature, such as the narcotic drug import and export offences under Part XIV of the Act, the offences that have monetary penalties are, with the exception of

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20 *Giorgianni* (1985) 156 CLR 473 at 479 (Gibbs CJ).

21 *Giorgianni* (1985) 156 CLR 473 at 487 – 488 (Gibbs CJ), 503 – 507 (Wilson, Deane and Dawson JJ).

22 *Customs Act*, s 244.

23 (1985) 158 CLR 661 at 667 (Mason ACJ, Wilson, Deane and Dawson JJ).

Queensland, dealt with as criminal matters in the lower courts (standard of proof – beyond reasonable doubt) and as civil matters in the superior courts. This is because the provisions that deal with the procedure for these offences diverge (see sections 247 and 248). While this anomaly is not logical, and the status of these offences is currently being reviewed by the Australian Law Reform Commission (which will report in March 2002), the purpose of this Bill is to harmonise offences with the *Criminal Code*. It is therefore considered that the least complex solution is to apply critical aspects of the general principles in Chapter 2 of the *Criminal Code* to all Customs prosecutions so that the same principles apply to basic concepts such as intention and the defences regardless of where the offence is heard. At the same time the provision will not apply Parts 2.4, 2.5 and 2.6 of Chapter 2 of the *Criminal Code* in recognition that those aspects may not translate easily to 'Customs prosecutions'. For example, the fundamental difference between criminal and civil matters – the burden and standard of proof – will be left to the existing law rather than applying the codified provisions in Part 2.6. As is the case now, the standard of proof will depend on the court in which the matter is heard. If it is dealt with as a criminal matter, the standard of proof will remain beyond reasonable doubt.

596. Proposed subsection 5AA(1) applies Chapter 2 of the *Criminal Code* to all offences in the *Customs Act 1901*, but this is subject to proposed subsection 5AA(2).

597. Proposed paragraph 5AA(2)(a) applies Parts 2.1, 2.2 and 2.3 of the *Criminal Code* to Customs prosecutions. These Parts concern general codification of criminal responsibility principles, physical and fault elements in offences, and circumstances in which there is no criminal responsibility.

598. Proposed paragraph 5AA(2)(b) provides that Parts 2.4 (which deals with criminal ancillary offences such as attempt and complicity and is not designed for use in the civil context - reliance can be had on existing sections 236 and 237 of the Act); Part 2.5 (which deals with corporate criminal responsibility and is consistent with what was said when the *Criminal Code* was introduced, is disapplied where the Act already has a separate provision (in this case section 257)); and Part 2.6 (which deals with the burden and standard of proof) do not apply to Customs prosecutions.

599. Proposed paragraph 5AA(2)(c) provides that where the *Criminal Code*[*'s*] general principles apply to a 'Customs prosecutions' they shall be taken to refer to 'responsibility' rather than 'criminal responsibility'. This is because in some situations they will be used to determine responsibility in the civil context. The term responsibility is preferred in that it is suitable for both criminal and civil matters.

600. Proposed subsections 5AA(3) and (4) make it clear the application of the *Criminal Code* is in no way meant to change the way in which Customs prosecutions are dealt with in the courts (including the standard and burden of proof).

601. Proposed subsection 5AA(5) defines 'Customs prosecution' in relation to the existing definition."

[39] The reference to the "civil context" in paragraph 598 must be understood in the context explained by paragraph 595 that, although it was anomalous, offences carrying monetary penalties could be prosecuted as criminal or civil matters, depending upon the jurisdiction. A consequence of the legislation was that s 236 continued to apply in Customs prosecutions but a different provision, s 11.2 of the *Criminal Code*, thereafter applied in relation to the other offences, including indictable offences carrying imprisonment, in the *Customs Act*. If that might be thought to provide anomalous results in some cases, that is not a reason for departing from the meaning of s 236 as it was before the amendments.

[40] The applicant accepts that the words "aids abets counsels or procures" require intent based on knowledge but submits that the immediately following words, which are in issue in this application, do not have that connotation. That submission gives insufficient weight to the considerations already mentioned and also to the structure of s 236. Each of what the applicant described as the "first limb" and the "second limb" of s 236 requires an act or omission by the alleged second party, and at least under the common law relating to crimes, each word of the first limb requires an act of a particular kind, although there was some overlap in meaning and some particular combinations of the words were to be considered as a whole.[24] The words "by act or omission is in any way directly or indirectly concerned in" form part of a composite expression that identifies the bases upon which a person other than the actual offender is deemed to have committed an offence and to be punishable accordingly. Given that the "first limb" admittedly requires knowledge and intent, no basis appears for rejecting that ordinary meaning of "concerned in" which requires a culpable state of mind.

[41] The applicant's construction also would make redundant, or at least substantially redundant, the requirement of intent based upon knowledge the applicant concedes is inherent in the words "aids abets counsels or procures", because, on that construction, the expression "or by act or omission is in any way directly or indirectly concerned in" comprehends at least substantially all of the acts and omissions that fall within the words "aids abets counsels or procures".

[42] The applicant referred the Court to the meanings given to "concerned in" in the *Oxford English Dictionary*. Only one of the many different meanings is potentially on point: "To be implicated or involved in something illegal or discreditable". The examples given by the dictionary refer to the usage of "concerned in" over four centuries. It is sufficient to refer to two of them: "… charged him positively with being concerned in that murther",[25] and "Police attended the Bexley Charcoal Grill to speak to a male suspect who had been concerned in criminal damage in a nearby bar".[26] As is to be expected, that dictionary definition does not answer the

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24 *Giorgianni* (1985) 156 CLR 473 at 480 (Gibbs CJ), 492-493 (Mason J).

25 1679, M. Prance, *True Narr. Popish Plot* 14.

26 2011, Bexley Times (Nexis) 10 Nov.

construction question, but it is consistent with the view that a person may fairly be said to be "concerned in the commission of" an offence only if that person either committed the offence or, knowing of the conduct by which the offence was committed, was intentionally concerned in that conduct.

[43] The expression "concerned in" does not necessarily connote intention based upon knowledge in all contexts. For example, in *Poyser v Commissioner for Corporate Affairs*,[27] Murphy J held that, in the prosecution of offences under companies' legislation prohibiting an undischarged bankrupt from acting as a director or directly or indirectly being "concerned in" the management of a corporation without the leave of the court, the prosecution was not required to prove that a defendant who had voluntarily and freely performed acts of the required kind had a guilty state of mind. That and other decisions about the meaning of "concerned in" when it is used to define an element of an offence may be helpful in a case concerning secondary liability in so far as those decisions elucidate the kind of conduct that amounts to being "concerned in" the commission of an offence. Such decisions cannot be authoritative, however, upon the question whether the same expression requires a culpable state of mind when it is used to extend responsibility for an offence to a person other than the actual offender.

[44] If, as the applicant argues, the expression "concerned in the commission of" an offence does not require any particular state of mind to be held by persons who (like the respondent) are innocent of any contravention of the statutory obligation, s 236 must capture a great many entirely innocent persons in a variety of offences. In *R v Beck*[28] a similar point was made by Macrossan CJ (McPherson J agreeing) in relation to s 7(1)(c) of the *Criminal Code* (Qld). That section deemed every person "who aids another person in committing the offence" to have taken part in committing the offence so as to be guilty of that offence and provided that such a person may be charged with actually committing it. Macrossan CJ considered it to be obvious enough that "aids" in s 7(1)(c) means "knowingly aids" for the reason that, if it were expressed to mean "does any act which has the effect of aiding any person in committing the offence" then "it would catch a lot of innocent people in its net, e.g. the taxi driver who innocently drives the passenger part of the way to the place where a crime will be committed by him."

[45] The applicant's answer to this concern, derived from an observation in *Ashbury v Reid*,[29] is that "concerned in" requires a "substantive and real practical connection between the act [or] omission and the commission of the offence". *Ashbury v Reid* does not support a construction under which intent based on knowledge is not necessary. In that case s 54(1) of the *Forestry Act* 1918-1945 (Vic) was in the same form as s 236 of the *Customs Act*. The meaning of "in any way directly or indirectly concerned in the commission of an offence" was in issue. Virtue J, delivering the judgment of the Full Court (Virtue, D'Arcy and Hale JJ) allowed an appeal from a decision refusing an order to review the conviction of the appellant of an offence of felling and destroying timber in a State forest. The appellant had engaged another person to clear the appellant's block of land, which adjoined the State forest. The boundary was apparently clearly marked. The appellant pointed out the boundaries to the other person, who nonetheless subsequently bulldozed

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27 [1985] VR 533 at 537.
28 [1990] 1 Qd R 30 at 38.
29 [1961] WAR 49 at 51.

about 50 acres of the State forest. The Court made the following observations about the meaning of the relevant provision:

> "Some of the many meanings of the word 'concerned' to be found in the Oxford Dictionary are: 'to be in a relation of practical connexion with', 'to have to do with', 'to have a part in', 'to be implicated or involved in', and 'to have to do with something, especially something culpable', and we think that this is the sense in which the word is used in this section. The question which a court should ask itself in determining whether an act or omission on the part of an individual comes within the terms of s 54 is whether on the facts it can reasonably be said that the act or omission shown to have been done or neglected to be done by the defendant does in truth implicate or involve him in the offence, whether it does show a practical connexion between him and the offence."

[46] So far as the necessary state of mind is concerned, the reference to the requirement that the act or omission "show a practical connection between [the accessory] and the offence" is expressed as a summary of the requirement that it "can reasonably be said that the act or omission shown to have been done or neglected to be done by the defendant does in truth implicate or involve him in the offence". That requirement could not be satisfied if the defendant's conduct was not accompanied by an intention based upon knowledge of the relevant conduct amounting to commission of the offence. The absence of evidence of such an intent appears to have been the very reason for the Full Court's decision to set aside that appellant's conviction of the offence. The passage as a whole strikes me as being consistent with my view that s 236 requires a guilty state of mind.

[47] The applicant submits that amendments made in the 1970s to insert ss 229A and 243A in Part XIII of the *Customs Act* ss 229A and 243A, which use the expression "knowingly concerned", and frequent amendments to those provisions thereafter, reveals a clear choice by Parliament to continue the application of s 236 in a form that does not include a "knowingly requirement". Accepting, as I do, that these provisions must be taken into account when construing the disputed expression in s 236, the mere fact that the words "knowingly concerned" are used in ss 229A and 243A does not justify the construction propounded by the applicant. Neither section provides for secondary liability for an offence; s 229A identifies circumstances in which proceeds of trafficking in drugs are liable to forfeiture and s 243A provides for circumstances in which pecuniary penalties may be recovered for dealings in narcotic goods. Particularly in circumstances in which the applicant does not suggest that upon the introduction and amendment of those provisions Parliament adverted to the expression "concerned in" in s 236, the use of "knowingly" in the added provisions is readily explicable by a legislative purpose of avoiding any doubt that knowledge is required.

[48] The applicant referred to the distinction between "concerned in" and "knowingly concerned in" drawn by Banks-Smith J in *Re ICandy Interactive Limited*.[30] Banks-Smith J regarded the absence of the word "knowingly" before the words "concerned in" in s 1322(6)(a)(ii) of the *Corporations Act* 2001 (Cth) as "a real distinction".[31]

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30 (2018) 125 ACSR 369 at 385 – 386 [94] – [103].

31 (2018) 125 ACSR 369 at 385 [99].

As Banks-Smith J observed in that context, however, s 1322(6)(a) does not address secondary liability. Banks-Smith J also took into account that s 1322 was remedial in nature and was to be given a liberal interpretation.[32] It is the context in which the expression "concerned in" is used in s 236 and that section's effect of imposing liability for conviction and penalty upon a person other than an actual offender that requires the conclusion that the expression requires intention based upon knowledge of the essential matters amounting to the commission of the offence.

[49] The applicant submits that the history preceding and postdating the enactment of the *Customs Act* in 1901 tends to confirm that Parliament had advertently maintained a distinction between "concerned" and "knowingly concerned".

[50] The extrinsic material related to the enactment does not shed light upon the present issue. In the House of Representatives the most direct reference to the provision (clause 222) which was enacted as s 236 occurred during debate in committee. A member, Mr Thomson, adverted to previous clauses he said the Minister had promised to consider and a question of liability raised by another member (Sir Malcolm McEacharn), concerning the master of a ship using or suffering the ship to be used in smuggling or other unlawful activity.[33] Mr Thomson stated that clause 222 was "a sort of drag-net clause", to which the Minister replied that the clause "ought to rake in all who are guilty". The Minister agreed to consider the matter, but the clause was agreed to and enacted in the same form. The Minister's reference to the provision applying to all who are guilty does not suggest that it was intended to apply to persons with an innocent state of mind.

[51] The second reading speech for the Bill for the *Customs Act* 1901 in the Senate included a statement that the Bill was "in substance the same as the Acts which are in force in all the States, and is really founded on the legislation of the United Kingdom as consolidated in the *Customs Act* of 1876."[34] Neither the *Customs Consolidation Act* 1876 (UK) nor the Customs Acts in force in the colonies or, after federation and before enactment of the *Customs Act*, the States, contained a stand-alone provision analogous to s 236.

[52] The colonial and State legislation largely reflected the provisions in the *Customs Consolidation Act*. Each offence-creating provision itself identified the persons liable to punishment, sometimes as actual offenders and sometimes as actual offenders and as persons subjected to secondary liability for the offences. The applicant submitted that deliberate distinctions were made in that legislation between "concerned in", and "knowingly concerned in", the requirement of knowledge being applicable only in relation to an offence that involved an intent to defraud the revenue, to evade a prohibition or restriction, or fraudulently, to evade or attempt to evade any duties of Customs or the laws and restrictions of Customs.

[53] No pattern appears in the antecedent legislation such as might justify an implication from the omission of "knowingly" before "concerned in" in s 236 of the *Customs Act* that the latter expression means "unknowingly concerned in". It is sufficient in this respect to refer to one lengthy provision, s 186, of the *Customs Consolidation*

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32 (2018) 125 ACSR 369 at 377 [43].

33 Hansard 16 July 1901 p 2557, with reference to p 2555 – 2556 (concerning clause 219 and s 195 of the Victorian Act).

34 Commonwealth, Parliamentary Debates, Senate, 14 August 1901 (Senator O'Connor, Vice President of the Executive Council), p 3671; a similar statement is at p 3672.

Act 1876 (UK), which was substantially reflected in the Customs legislation of the colonies, and subsequently the States, and which is reflected also in various provisions of the *Customs Act*. For ease of reference I have separated and numbered the clauses of s 186:

> **186. Illegally importing. Unshipping. Removing from quay, wharf, & c. Carrying goods into warehouse without authority. Removing from warehouse. Harbouring. Carrying. Evading duties of Customs. Penalty treble value, or 100l.**
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> Every person who
>
> (1) shall import or bring, or be concerned in importing or bringing into the United Kingdom any prohibited goods or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unshipped or not; or
>
> (2) shall unship, or assist or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured; or
>
> (3) shall deliver, remove, or withdraw from any ship, quay, wharf, or other place previous to the examination thereof by the proper officer of Customs, unless under the care or authority of such officer, any goods imported into the United Kingdom or any goods entered to be warehoused after the landing thereof, so that no sufficient account is taken thereof by the proper officer, or so that the same are not duly warehoused; or
>
> (4) shall carry into the warehouse any goods entered to be warehoused or to be re-warehoused, except with the authority or under the care of the proper officer of the Customs, and in such manner, by such persons, within such time, and by such roads or ways as such officer shall direct, or
>
> (5) shall assist or be otherwise concerned in the illegal removal or withdrawal of any such goods from any warehouse or place of security in which they shall have been deposited; or
>
> (6) shall knowingly harbour, keep, or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods, or any goods which shall have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited; or
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> (7) shall knowingly acquire possession of any such goods; or
>
> (8) shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods; or

> (9) shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs, or of the laws and restrictions of the Customs relating to the importation, unshipping, landing, and delivery of goods, or otherwise contrary to the Customs Acts;
>
> shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons."

[54] The expression "knowingly concerned in" is used in clauses 8 and 9, not to impose liability upon a second party, but to describe one of the mental elements of a fraud offence by the actual offender. The only clauses that impose secondary liability upon a participant in an offence are clauses 1, 2, 5 and 6. In clause 6 the expression "or cause or procure to be" may be regarded as imposing liability on a person who causes or procures the actual offender to commit the offence created by the introductory words "Every person who … shall knowingly harbour, keep or conceal … any prohibited, restricted, or uncustomed goods …". Although the word "knowingly" does not appear before the words "cause or procure", it is difficult to accept that a person who did not know of, and intend to cause or procure, the principal offender's conduct of harbouring etc might be made liable as a second party in an offence which requires that the actual offender intend to harbour etc. That intention based upon knowledge is required to impose secondary liability in that case is also indicated by the established meaning of the word "procure". There is nothing to suggest that the word "cause" in the expression "cause or procure" conveys a more liberal meaning.

[55] In two of the three clauses which impose secondary liability by the words "concerned in", those words appear in the phrase "assist or be otherwise concerned in" (in clauses 2 and 5). The word "assist", as a synonym of the word "aid", when used in the context of imposing liability for the offence of another, connotes assistance with an intention to assist based upon knowledge of the essential facts making up the actual offender's offence.

[56] The conclusion that knowledge and intent is required by clause 2 of s 186 (and cognate clauses) is also suggested by a decision under antecedent legislation[35] from which that clause appears to have been derived. That legislation enacted that "every person who shall, either in the United Kingdom or the Isle of Man, unship, or assist, or be otherwise concerned in the unshipping of any goods which are prohibited to be imported into the United Kingdom or into the Isle of Man, or the duties for which have not been paid or secured … shall forfeit either the treble value thereof, or the penalty of 100l, at the election of the Commissioners of Her Majesty's Customs." In *Attorney-General v Robson*[36] the defendant was "the owner of a vessel which he had let on a voyage from Newcastle to Scheveling, well knowing that the object of the voyage was to fetch tobacco, and run the same at Yarmouth." "The defendant had cleared the vessel … at Newcastle, … for a voyage with coals to Yarmouth," but with the defendant's knowledge "the captain sailed direct to Scheveling under the guidance of a pilot sent on board by the charterers". After the vessel arrived at Yarmouth with a cargo of tobacco, and after that cargo had been

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35 *Prevention of Smuggling Act* 1845, 8 & 9, Vict. c. 87, s 46.

36 (1850) 5 Ex. 790; 155 ER 346 at 346 [791].

"run", "[the defendant] complimented the captain on the clever way in which he had managed the matter." The defendant received 200l. for the use of his vessel.

[57] The defendant was found guilty and a penalty of 8000l. was imposed. Upon a motion for a new trial it was argued for the defendant that "a person who merely afforded to others the means of doing a particular act could not be said to do it himself"; "[t]he defendant took no part in the running of the tobacco and … his interest in the transaction ceased, when the vessel arrived at Yarmouth".[37] The rule was refused. Pollock CB, after rhetorically asking whether, assuming an indictment of conspiracy, it could have been said that the defendant was not an associate in the transaction, observed that the words "otherwise concerned" meant "having any interest whatever in the matter". Alderson B stated that "[p]erhaps it might not be said that the defendant "assisted", but he was certainly "concerned" in the unshipping."

[58] In that case the evidence established that the defendant knew of the proposed conduct constituting the offence when he hired the ship. The question which appears to have been resolved by the decision was whether, although intentional conduct of that kind with such knowledge might not amount to assisting, it could be regarded as establishing that the ship owner was "concerned in" the offence. Pollock CB's reference to the defendant having an interest in the matter in the context of his reference to a conspiracy, conveys satisfaction that the defendant knew of, and by hiring the ship, intended to be concerned with the commission of the offence.

[59] The applicant's argument about the legislation of the United Kingdom, the colonies, and the States preceding enactment of the *Customs Act* assumed that, in the provisions which imposed secondary liability, the expression "concerned in" did not carry any connotation of intention or knowledge of the conduct constituting the offence. That appears not to be the proper construction at least of clauses 2, 5 and 6 of s 186 and, for that reason, it also appears unlikely to be the proper construction of clause 1. If the proper constructions of those provisions might be thought to be doubtful, any such doubt would not survive the enactment of the stand alone provision in s 236, which, upon enactment, applied both to indictable offences and to other offences created by the *Customs Act*, and which used the expression "concerned in" in connection with other words whose established meanings require intentional conduct based upon knowledge of the essential facts constituting the commission of an offence.

[60] In *Customs Law and Regulations* (1904), Mr Wollaston (a barrister, the permanent head of the Department of Trade and Customs, and the Comptroller-General of Customs) expressed the opinion that under s 236 "it would not appear to be necessary to prove knowledge on the part of the defendant". None of the cases cited in the text, which include *Attorney-General v Robson*, support that opinion. Nor is it supported by the author's other notes about the section, which are directed to different topics. A contrary view is suggested by the statement in *Customs and Excise Law*, EJ Cooper (1984), that the "mere hiring of a vessel, which was used for a smuggling venture abroad, did not make the owner "concerned" without evidence of having taken part in the transaction [citing *AG v Kenifeck* (1837) 2 M & W 715, 150 ER 944], but the owner of a vessel who knowingly let the vessel for unlawful purposes was held to be "concerned" [citing *A-G v Robson*]."[38]

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37 (1850) 5 Ex 790; 155 ER 346 at 347 [791].

38 *Customs and Excise Law*, EJ Cooper (1984), at p 372 [2209].

[61] The applicant also contrasted the provisions of s 236 of the *Customs Act* with other provisions imposing secondary liability. The *Customs Act* was Act number 6 of 1901. A provision in the same terms as s 236 was included in each of Acts numbered 7 – 9 of 1901 (*Beer Excise Act* 1901 (Cth), *Distillation Act* 1901 (Cth) and *Excise Act* 1901 (Cth)). In an Act enacted four years later, the *Secret Commissions Act* 1905 (Cth), s 10 included a provision to similar effect, save that the operative expression was "aids, abets, counsels or procures or is in any way directly or indirectly knowingly concerned in or privy to … the commission of any offence against this Act …". As the applicant submitted, many subsequent provisions of Commonwealth legislation imposing secondary liability use the expression "knowingly concerned in". The primary judge referred to one such provision, s 1324(1) of the *Corporations Act* 2001. The applicant referred to other examples in s 54 of the *Security of Criminal Infrastructure Act* 2018 (Cth) and s 422 of the *Export Control Act* 2020 (Cth).

[62] Another example is s 82 of the *Trade Practices Act* 1974 (Cth), which confers a right of action upon a person who suffered loss or damage by the conduct of another person in contravention of s 52 against that other person or a "person involved in the contravention", a term defined in s 75B of the same Act to include persons who, amongst other matters, have "aided, abetted, counselled or procured the contravention" or have "been in any way, directly or indirectly, knowingly concerned in, or a party to the contravention …". In *Yorke v Lucas*, the High Court held that, although the word "knowingly" did not qualify the words "party to", "a person could only properly be said to be "party to" a "contravention" if [the party's] participation was in the context of knowledge of the essential facts constituting the particular contravention in question", there being, "nothing in the paragraph itself which would point to any conclusion other than the words "party to" are used to refer to a participant in the nature of an accessory".[39]

[63] The applicant's argument about the effect of the presence of "knowingly" in provisions for secondary liability enacted after the enactment of the *Customs Act* is not supported by reference to any extrinsic material. It seems likely that the word "knowingly" was used in later legislation to avoid any doubt that proof of secondary liability for an offence required a guilty state of mind. In the absence of any basis for preferring a different explanation, the use of the expression "knowingly concerned in" in other Commonwealth legislation should not be regarded as detracting from what I consider to be the ordinary meaning of "concerned in" in s 236 of the *Customs Act*. It is therefore not necessary to consider whether the applicant's argument on this point is otherwise consistent with the principles of statutory construction.

[64] I note also that in *Chief Executive Officer of Customs v Lin*[40] Templeman J observed that under s 236 of the *Customs Act* the allegation against a defendant that he was "directly or indirectly concerned in" the making false statements "involves an element of intention". In addition, it should be noted that in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors*[41] Fryberg J held that, although the word "knowingly" did not appear in s 236 of the *Customs Act*, it was

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39 (1985) 158 CLR 661 at 670 (Mason ACJ, Wilson, Deane, Dawson JJ). Brennan J reasoning at p. 677 was to similar effect.

40 [2007] WASC 314 at [50].

41 [2006] QSC 4 at [247].

"common ground that this difference between [s 236 and s 5 of the *Crimes Act* 1914] is of little or no consequence".

[65] My conclusion is that in a prosecution under s 236 of the *Customs Act* upon the ground that the defendant was "by act or omission … in any way directly or indirectly concerned in the commission of any offence against this Act" proof is required that the defendant, knowing of the conduct constituting the essential facts by which the offence was being or would be committed, intentionally did or omitted to do the act by which the defendant is alleged to have been concerned in the commission of the offence.

[66] Upon that construction, s 236 could render the respondent guilty of any of the charged offences only if the respondent knew that the required report had not been received by Customs and intentionally did not report on the master's behalf to Customs before the end of the specified period. Upon the magistrate's findings, in each case it was not proved that the respondent knew before the expiry of the relevant period that the report had not been received by Customs or that the respondent intended that the report not be received by that time.

[67] No ground of the applicant's appeal to the District Court contended that the magistrate erred in failing to find in any of the cases that the respondent knew before the expiry of the specified period that the report had not been received by Customs or that the respondent intentionally failed to provide the report to Customs within the specified period. For that reason, the order dismissing the appeal to the District Court was correct. It follows that the applicant's appeal from that order should be dismissed.

Orders

[68] In my opinion the appropriate orders are:

(a) Grant the application for leave to appeal, limited to the applicant's contention that the primary judge erred in deciding that liability under s 236 of the *Customs Act* had not been established against the respondent because a "mistake of fact defence" under s 9.2 of the Commonwealth *Criminal Code* might be available to the masters.

(b) Dismiss the appeal.

(c) The applicant is to pay the respondent's costs of the application and the appeal.

[69] **PHILIPPIDES JA:** I agree with the reasons of Fraser JA and the orders proposed.

[70] **MULLINS JA:** I agree with Fraser JA.