

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd

[2003] 201 ALR 1 (5 September 2003)

By Christopher O'Donnell

Introduction

The vexed question of what the applicable standard of proof is in customs and excise prosecutions has finally been settled by the High Court in this decision. The applicable standard is the criminal standard, requiring proof beyond reasonable doubt. Prior to the decision the question was unsettled due to conflicting authorities.

In *Evans v Lynch* [1984] 3 NSWLR 567 at 570 and *Evans v Button* (1988) 13 NSWLR 57 at 73 the New South Wales Court of Appeal held that customs prosecutions were civil by nature. Carruthers J, at first instance in *Button v Evans* [1984] 2 NSWLR 338 at 353 held that the applicable standard of proof was the civil standard. In *Moore v Jack Brabham Holdings Pty Limited* (1986) 7 NSWLR 470 at 482 Hunt J took a different view, stating that the true nature of customs prosecutions was criminal. As Chief Justice at Common Law he reached the same conclusion in *Comptroller-General of Customs v D'Aquino Bros Pty Limited* (1996) 135 ALR 649 at 661. The Queensland Court of Appeal held that the criminal

standard was the applicable standard in the decision that was the subject of this appeal to the High Court: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 188 ALR 493.

Despite holding that the criminal standard of proof applies to customs and excise prosecutions the High Court's decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* has re-affirmed the hybrid nature of these prosecutions, which retain civil procedural aspects.

Although the decision arose from prosecutions conducted in Queensland, it is contended, for the reasons outlined below, that it has application in New South Wales, and requires proof beyond reasonable doubt where customs and excise prosecutions are conducted in this state.

Background to the appeal

The appeal arose out of proceedings brought by the appellant against the respondent in the Supreme Court of Queensland. The respondent was alleged to have moved goods without

2004 Gallipoli and Western Front Battlefield Tours

Join the experts from the Australian War Memorial and walk in the footsteps of those who forged the ANZAC legend. Understand why this legend continues to strengthen. We aim to give you the trip of a lifetime.

Places are limited. Book soon to avoid disappointment.

TOUR DEPARTS APRIL, 2004

Travel Services

PHONE
1800 035 350

email marketing@awm.gov.au
www.awm.gov.au/services/battlefield/

Australian War Memorial
WINNER 2000-2003
Battlefield Tourism Awards
Major Tourist Attraction
HALL OF FAME

authorisation and evaded customs and excise duty contrary to secs 33 and 234(1)(a) of the *Customs Act 1901* (Cth) and secs 61 and 120(1)(iv) of the *Excise Act 1901* (Cth). These are customs prosecutions and excise prosecutions as defined by sec 244 of the Customs Act and sec 133 of the Excise Act respectively. Similar provisions in the two Acts state that such prosecutions may be 'commenced, prosecuted and proceeded with in accordance with any rules of practice and procedure 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 the directions of the court or a judge': Customs Act sec 247; Excise Act sec 136.

The standard of proof question

Hayne J, with whom Gleeson CJ and McHugh J agreed, emphasised that the classification of proceedings as 'civil' or 'criminal' was not determinative of the standard of proof. Such classifications ignore the fact that some proceedings have both civil and criminal characteristics. Hayne J held that the standard of proof to be applied in customs and excise prosecutions was not a matter of 'practice and procedure' within Customs Act sec 247 and Excise Act sec 136. Since neither Act provided for the standard of proof applicable to such prosecutions the operation of the *Judiciary Act 1903* (Cth) had to be considered. Section 79 of the Judiciary Act picks up and applies state laws of procedure, evidence and the competency of witnesses to state courts exercising federal jurisdiction. Hayne J considered this to have no operation because there was no Queensland law that provides for the applicable standard of proof in customs and excise prosecutions.

Accordingly, Hayne J found that sec 80 of the Judiciary Act applied. Where a state court is exercising federal jurisdiction in civil and criminal matters, sec 80 operates to pick up and apply in those proceedings the common law in Australia as modified by the Constitution and state law. Hayne J held that the penalties that may be recovered in customs and excise prosecutions were not merely financial but extended to conviction of the defendant. For this reason the common law, as picked up by sec 80, required proof beyond reasonable doubt before a conviction could be entered. In this regard customs and excise prosecutions differ from proceedings for civil penalties under, for example, the *Corporations Act 2001* (Cth) and the *Trade Practices Act 1974* (Cth). Civil penalty proceedings, although sometimes having severe penal consequences (in the form of punitive damages), do not result in conviction of the defendant. Hayne J reaffirmed in *obiter dicta* that the applicable standard of proof in civil penalty proceedings is the civil standard.

Gummow J held that sec 4 of the *Crimes Act 1914* (Cth) applied to customs and excise prosecutions. Although now repealed, it applied at the relevant time and provided that

'Despite holding that the criminal standard of proof applies to customs and excise prosecutions the High Court's decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* has re-affirmed the hybrid nature of these prosecutions, which retain civil procedural aspects.'

common law principles of criminal liability applied to offences against the laws of the Commonwealth. Gummow J held that customs and excise prosecutions were proceedings for offences against the laws of the Commonwealth. Gummow J noted that the introduction of sec 5AA of the Customs Act from 15 December 2001, which applies parts of the Commonwealth Criminal Code to Customs Act offences, but not Part 2.6 which deals with the criminal standard of proof, may mean that the repeal of sec 4 of the Crimes Act was only partial. In other words, sec 4 may still apply the criminal standard of proof to customs and excise prosecutions.

Kirby J adopted a broader approach than the other justices, but reached the same conclusion on the standard of proof. Kirby J found that in the absence of a clear statutory intention in the words of sec 247 of the Customs Act and sec 136 of the Excise Act the legislature could not be presumed to have intended to abrogate the basic entitlement that a person should not be 'convicted' of an 'offence', with the serious consequences that entailed, unless the offence was proved beyond reasonable doubt.

The Queensland Evidence Act question

The High Court also decided the question of whether customs and excise prosecutions are 'criminal proceedings' for the purposes of the *Evidence Act 1977* (Qld). The question arose because the appellant wished to rely upon sec 92 of the Queensland Evidence Act. This provides for the admissibility of documentary evidence as to facts in issue in civil proceedings only. Section 93 of the Queensland Evidence Act provides for the admissibility of documentary evidence as to facts in issue in criminal proceedings.

The High Court held unanimously that sec 92 of the Queensland Evidence Act was the applicable provision in customs and excise prosecutions. This was not because those proceedings were 'civil' proceedings for the purposes of the Queensland Evidence Act but because sec 247 of the Customs Act and sec 136 of the Excise Act require the Supreme Court of Queensland to apply its usual practice and procedure in civil cases to customs and excise prosecutions. The admissibility of documents being a procedural question, sec 92, not sec 93 of the Queensland Evidence Act is the applicable provision.

The hybrid nature of customs and excise prosecutions is highlighted by the application to them of both the criminal standard of proof and civil rules about the admissibility of evidence.

Conclusion: the position under the Uniform Evidence Law

As the Uniform Evidence Law applicable in New South Wales and federally has not been adopted in Queensland, it is necessary to consider separately the effect of the High Court's decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* upon customs and excise prosecutions in Uniform Evidence Law jurisdictions.

An application of the prevailing reasoning of Hayne J to the situation of a customs or excise prosecution in the New South Wales Supreme Court raises some interesting questions.

'An application of the prevailing reasoning of Hayne J to the situation of a customs or excise prosecution in the New South Wales Supreme Court raises some interesting questions.'

The *Evidence Act 1977* (Qld) is silent on the standard of proof in civil or criminal proceedings. By contrast, the *Evidence Act 1995* (NSW) provides that the standard of proof for a civil proceeding is proof on the balance of probabilities: sec 140. A civil proceeding is defined in the dictionary as a proceeding other than a criminal proceeding. The standard of proof for a criminal proceeding is proof beyond reasonable doubt: sec 141. A criminal proceeding is defined as 'a prosecution for an offence' and includes committal, bail and sentence hearings. These provisions are mirrored in the *Evidence Act 1995* (Cth).

It could be argued that the reasoning of Hayne J means that sec 247 of the Customs Act and sec 136 of the Excise Act will operate to pick up those parts of the *Evidence Act 1995* that apply in civil proceedings, including sec 140, when a customs or excise prosecution is conducted in New South Wales.

However, it is submitted that this conclusion does not follow from the High Court's judgment for the following reasons:

1. The better view is that sec 247 of the Customs Act and sec

136 of the Excise Act do not operate to pick up sec 140 of the *Evidence Act 1995* because it is not a procedural provision, despite being included in the *Evidence Act 1995*;

2. If sec 140 of the *Evidence Act 1995* was picked up by sec 247 of the Customs Act and sec 136 of the Excise Act this would lead to different standards of proof applying to customs and excise prosecutions, depending on which state or territory the proceedings were commenced in;

3. For the purpose of determining the applicable standard of proof the reasoning of Hayne J characterises customs and excise prosecutions as criminal prosecutions. For this purpose they are 'prosecutions for an offence' within the meaning of 'criminal proceeding' under the meaning of the *Evidence Act 1995*. Therefore, sec 79 of the Judiciary Act will pick up the New South Wales law of evidence governing the standard of proof in criminal prosecutions. This is sec 141 of the *Evidence Act 1995*, which applies the criminal standard of proof; and

4. If the approach outlined in paragraph 3 above is not correct, and customs and excise prosecutions, because of their hybrid nature, are neither civil proceedings or criminal proceedings within the meaning of those terms under the *Evidence Act 1995*, then there is no New South Wales law that provides for the applicable standard of proof in customs and excise prosecutions. If this is the case, sec 80 of the Judiciary Act will pick up the common law, which, according to the reasoning of Hayne J, requires proof beyond reasonable doubt in a customs or excise prosecution.

For these reasons it is submitted that the better view is that the applicable standard of proof in customs and excise prosecutions conducted in New South Wales is the criminal standard.

Although Tasmania has adopted much of the Uniform Evidence Law in the *Evidence Act 2001* (Tas), that Act does not include provisions equivalent to sec 140 and sec 141 of the *Evidence Act 1995* (NSW). The Tasmanian Act is silent on the standard of proof in civil and criminal proceedings. The position in Tasmania is, therefore, identical to the position in Queensland and the applicable standard of proof for customs and excise prosecutions conducted in Tasmania is the criminal standard.