HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

CHIEF EXECUTIVE OFFICER OF CUSTOMS APPELLANT

AND

LABRADOR LIQUOR WHOLESALE PTY LTD & ORS RESPONDENTS

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd
[2003] HCA 49
5 September 2003
B46/2002

ORDER

1. *Appeal allowed in part.*

2. *Set aside paragraphs 2 and 3 of the orders of the Court of Appeal of Queensland made on 20 July 2001 and, in lieu thereof, vary the order of Atkinson J made on 9 June 2000 by substituting the following:*

   (a) *What is the standard of proof required of the plaintiff in these customs prosecutions in order for him to obtain convictions for offences against ss 33 and 234(1)(a) and (d) of the* Customs Act *1901 (Cth)?*

   Answer: In order to obtain a conviction of a defendant for any of the offences specified, the elements of the offence must be established beyond reasonable doubt.

   (b) *What is the standard of proof required of the plaintiff in these excise prosecutions in order for him to obtain convictions for offences against ss 61 and 120(1)(iv) of the* Excise Act *1901 (Cth)?*

   Answer: In order to obtain a conviction of a defendant for any of the offences specified, the elements of the offence must be established beyond reasonable doubt.

   (c) *Are these customs prosecutions criminal proceedings for the purposes of the* Evidence Act *1977 (Q)?*

Answer: Those provisions of the Evidence Act *1977 (Q) which would be applied by the Supreme Court of Queensland in civil cases (including, in particular, the provisions of s 92 of that Act) are to be applied in the trial of the present proceedings.*

(d) Are these excise prosecutions criminal proceedings for the purposes of the Evidence Act *1977 (Q)?*

Answer: Those provisions of the Evidence Act *1977 (Q) which would be applied by the Supreme Court of Queensland in civil cases (including, in particular, the provisions of s 92 of that Act) are to be applied in the trial of the present proceedings.*

On appeal from the Supreme Court of Queensland

Representation:

A Robertson SC with F W Redmond and G A Hill for the appellant (instructed by Australian Government Solicitor)

T D O J North SC with J Brasch for the respondents (instructed by Forde Lawyers)

Intervener:

A Robertson SC with F W Redmond and G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd

Customs and excise – Prosecutions under *Customs Act* 1901 (Cth) and *Excise Act* 1901 (Cth) – Standard of proof required in order to obtain convictions for offences against specified provisions of *Customs Act* 1901 (Cth) and *Excise Act* 1901 (Cth).

Practice and procedure – Prosecutions under *Customs Act* 1901 (Cth) and *Excise Act* 1901 (Cth) – Whether standard of proof a matter of "practice and procedure" in the context of s 247 *Customs Act* 1901 (Cth) and s 136 *Excise Act* 1901 (Cth) – Whether standard of proof within contemplation of rules governing "commencing, prosecuting or proceeding with" a prosecution – Whether statutory averment provisions affect question of standard of proof.

Federal jurisdiction – Supreme Court exercising federal jurisdiction in respect of "Customs prosecutions" and "Excise prosecutions" under *Customs Act* 1901 (Cth) and *Excise Act* 1901 (Cth) – Whether s 79 *Judiciary Act* 1903 (Cth) "picks up" any State law prescribing standard of proof to be applied – Whether s 80 *Judiciary Act* 1903 (Cth) applies to direct attention to common law principles.

Criminal law – Prosecutions under *Customs Act* 1901 (Cth) and *Excise Act* 1901 (Cth) – Standard of proof – Common law requirements where conviction sought for offence against a law of the Commonwealth – Significance of orders sought in prosecution proceedings – Meaning of "conviction" – Relevance of penal consequences of prosecutions to issue of whether proof beyond reasonable doubt necessary.

Words and phrases – "Customs prosecution", "Excise prosecution", "recovery of penalties", "usual practice and procedure", "commenced prosecuted and proceeded with", "conviction".

Customs Act 1901 (Cth), ss 33, 234, 244, 247, 255.
Excise Act 1901 (Cth), ss 61, 120, 133, 136, 144.
Judiciary Act 1903 (Cth), ss 68, 79, 80.
Crimes Act 1914 (Cth), ss 4(1), 21B.
Evidence Act 1977 (Q), s 92.

1 GLEESON CJ. I have had the benefit of reading in draft the judgment of Hayne J. I agree with the orders proposed by his Honour and with his reasons.

2 As to the question of standard of proof, the statutory provisions invoked by the appellant in these proceedings refer to offences, guilt, conviction and punishment. To paraphrase what was said by McTiernan J in *Mallan v Lee*[1], the legislative description of the conduct alleged, and of the orders which the appellant seeks, should be accepted at face value. That being so, the common law requires that the appellant should establish the elements of the alleged offences beyond reasonable doubt.

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1 (1949) 80 CLR 198 at 217-218.

3 McHUGH J. I agree with the orders proposed by Hayne J and with his Honour's reasons.

4 GUMMOW J. The prosecutions under the *Customs Act* 1901 (Cth) ("the Customs Act") and the *Excise Act* 1901 (Cth) ("the Excise Act") giving rise to this appeal concern the alleged unlawful failure to pay certain customs and excise duties due on alcohol and cigarettes, by falsely claiming that the goods had been exported from Australia to the Solomon Islands and Fiji in 1996. The second and third respondents are directors of the first respondent, and are charged, broadly, with having aided and abetted the commission of the offences alleged against the corporation.

The proceedings

5 The appellant instituted proceedings by writ of summons in the Supreme Court of Queensland naming the three respondents as defendants. A judge of the Supreme Court (Atkinson J) answered preliminary questions posed by consent of the parties[2]. There were four questions. The first two concerned the standard of proof required of the appellant. The remaining two concerned the application of the *Evidence Act* 1977 (Q) ("the Queensland Evidence Act"). The appellant wished at trial to avail himself of the provisions of s 92 of that statute respecting the admissibility of documentary evidence as to facts in issue. The Court of Appeal (McMurdo P, Thomas JA, Byrne J), with McMurdo P dissenting as to the questions respecting the Queensland Evidence Act, answered both sets of questions to the opposite effect of the primary judge[3]. The questions respecting standard of proof were answered by the Court of Appeal by stipulating "proof beyond reasonable doubt" and the answers respecting the Queensland Evidence Act produced the result that s 92 thereof would not be applicable at trial.

6 I would allow the appeal to this Court and make orders as proposed by Hayne J. The effect of these orders is to determine that, in order to obtain a conviction, it will be necessary for the elements of the relevant offences to be established beyond reasonable doubt. However, at trial, s 92 of the Queensland Evidence Act will be applicable.

7 What follows are my reasons for reaching that result. I begin with consideration of those questions directed to the standard of proof.

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2 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2000) 179 ALR 563.

3 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 188 ALR 493.

Standard of proof

8 By the Amended Statement of Claim, the appellant sought (i) declarations that each of the respondents was liable to conviction for offences contrary to s 33 and pars (a) and (d) of s 234(1) of the Customs Act and contrary to s 61 and par (iv) of s 120(1) of the Excise Act; (ii) conviction for those offences; (iii) orders for recovery of penalties against the respondents; and (iv) an order pursuant to s 21B of the *Crimes Act* 1914 (Cth) ("the Crimes Act").

9 Section 21B operates in circumstances including those where "a person is convicted of an offence against a law of the Commonwealth"; it empowers the court, in addition to imposing penalties, to order the offender, amongst other things, "to make reparation to the Commonwealth ... by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth ... by reason of the offence".

10 It will be apparent from the reliance upon s 21B that the provisions of the Customs Act and the Excise Act to which reference has been made are treated in the Amended Statement of Claim as answering the description of offences against laws of the Commonwealth in respect of which conviction is sought. That assumption is well founded.

11 The identified sections of the Customs Act were s 33 and pars (a) and (d) of s 234(1). Paragraph (a) of s 234(1) is concerned with the evasion of duty and par (d) with the making of false or misleading statements to an officer of the Australian Customs Service ("Customs"). Paragraphs (a) and (c) of s 234(2) deal with persons who contravene the relevant paragraphs of s 234(1); they do so by stating that persons contravening the laws in question are "guilty of an offence punishable upon conviction" by the pecuniary penalties specified. Further provision for those convicted of offences against par (d) of s 234(1) is made in s 234(3). The phrases "guilty of an offence" and "punishable upon conviction" are significant for what follows in these reasons.

12 Section 33(1) of the Customs Act imposes a prohibition upon the moving of goods subject to the control of Customs. At the relevant time, at the foot thereof a sum was stated beside the term "Penalty". Section 5 of the Customs Act states that, where a penalty is set out at the foot of a sub-section, this indicates that a contravention of the sub-section is "an offence against this Act, punishable upon conviction by a penalty not exceeding the penalty so set out".

13 The other offences in question are those created by ss 61 and 120(1)(iv) of the Excise Act. Section 61 is in similar form to s 33 of the Customs Act. Section 5 of the Excise Act broadly corresponds to s 5 of the Customs Act. Section 120(1)(iv) is in similar form to par (a) of s 234(1) of the Customs Act.

14 The form in which all of these provisions are cast is significant. It indicates that what is sought against the respondents are convictions for offences against the laws of the Commonwealth. Ordinary understanding then would suggest that what is required for that result is proof beyond reasonable doubt. That conclusion the appellant calls into question. He seeks restoration of the answer given by the primary judge that the civil standard of proof applies.

15 Section 4 of the Crimes Act is of central importance in meeting the appellant's case. The section was inserted, with effect from 15 September 1995, by s 3 of the *Crimes Amendment Act* 1995 (Cth) ("the 1995 Act")[4]. It was in force at the time of the alleged commission of the offences and the taking of subsequent proceedings in the Supreme Court of Queensland. Section 4 was repealed with effect from 15 December 2001 by Sched 51 of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth) ("the Application of Criminal Code Act")[5]. However, given the sequence of events in this case, the operation of s 4 upon the present prosecution would be preserved by s 8 of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act").

16 Section 4 states:

> "(1) Subject to this Act and any other Act, the principles of the common law with respect to criminal liability apply in relation to offences against laws of the Commonwealth.
>
> (2) This section has effect despite section 80 of the *Judiciary Act* [1903 (Cth) ('the Judiciary Act')]."

The Explanatory Memorandum to the House of Representatives for the Bill for the 1995 Act stated one of its purposes, pending the enactment of the Bill for the *Criminal Code Act* 1995 (Cth), to be the application of the common law principles of criminal liability to all Commonwealth offences. The note to cl 3 of the Bill stated:

> "Proposed subsection 4(1) provides that, subject to the Act or another Act, the principles of common law with respect to criminal liability apply to all Commonwealth offences. The omitted section 4 had only applied these principles to offences under the [Crimes Act]. Any other offence was dealt with according to the prevailing law of the particular State or

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4 Previously, s 4 of the Crimes Act had stated:

> "The principles of the common law with respect to criminal liability shall, subject to this Act, apply in relation to offences against this Act."

5 Sched 51, Item 4.

> Territory where it was committed. So a person committing an offence against such a law in Victoria, a common law jurisdiction, was treated differently to [a] person committing the same offence in Queensland, a Griffith Code jurisdiction.
>
> Proposed subsection 4(2) provides that the section applies despite section 80 of the [Judiciary Act]. Section 80 was the means by which the principles were applied and will no longer operate in that manner with respect to the principles of criminal liability."

17 As to the common law principles of criminal liability, the general proposition stated by Professor Glanville Williams is in point[6]:

> "Questions of burden of proof and presumptions are intimately bound up with the substantive law."

That scholar went on to repeat what Kitto J said[7] were the memorable words of Lord Atkin in *Lawrence v The King*[8]:

> "[I]t is an essential principle of our criminal law that a criminal charge has to be established by the prosecution beyond reasonable doubt".

18 As it happens, Glanville Williams' statement respecting the intimate connection between this burden of proof and the substantive law is further supported in Australia by the general provision now made, since the institution of this litigation, by further Commonwealth law. With effect from 15 December 2001, Ch 2 of the *Criminal Code* (Cth) ("the Criminal Code") applies to offences against the laws of the Commonwealth (s 2.2). The purpose of Ch 2 is to codify the general principles of criminal responsibility under the laws of the Commonwealth (s 2.1). Section 13.2 states:

> "(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
>
> (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof."

It will be recalled that s 4 of the Crimes Act was repealed by Sched 51 of the Application of Criminal Code Act with effect from the commencement date of

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6 *Criminal Law, The General Part*, 2nd ed (1961), §286.

7 *Thomas v The Queen* (1960) 102 CLR 584 at 595.

8 [1933] AC 699 at 707.

s 13.2 of the Criminal Code and is superseded by it. Section 4 now does not apply in relation to an offence to which Ch 2 of the Criminal Code applies[9].

19 However, there is now the following difficulty with Customs prosecutions. Whilst s 5AA(1) of the Customs Act[10] states that Ch 2 of the Criminal Code applies to offences against the Customs Act, that general provision is subject to the exclusion of Pt 2.6 of the Criminal Code. The exclusion is made by s 5AA(2)(b) of the Customs Act. Part 2.6 includes the provision respecting standard of proof in s 13.2. Further, s 5AA(4) of the Customs Act states that the section "is not to be interpreted as affecting in any way the standard or burden of proof for any offence under this Act that is the subject of a Customs prosecution". The term "Customs prosecution" is said to have the meaning given in s 244 of the Customs Act. What that standard of proof requires is left unspecified by s 5AA.

20 The apparent intention of the Parliament in enacting s 5AA, as part of the Application of Criminal Code Act, was to leave unaltered the law respecting the Customs Act as it stood at 15 December 2001. What is the result? It may be that the Parliament has partly qualified the repeal of s 4 of the Crimes Act by the same statute as enacted s 5AA of the Customs Act. As to Customs prosecutions, was there left to operate in accordance with its terms the statement in s 4 of the Crimes Act that the principles of the common law with respect to criminal liability apply in relation to offences against laws of the Commonwealth? It is unnecessary here to determine that question. This appeal, given the relevant time scale and the operation in any event of the Interpretation Act, turns upon the application of s 4 in its pristine state.

21 Section 4 is expressly qualified by anything provided in "any other Act". Do any provisions of the *Evidence Act* 1995 (Cth) ("the Commonwealth Evidence Act") make provision qualifying what otherwise would be the operation of s 4 for the present appeal? The answer is in the negative. This is for several reasons. First, s 8(1) of the Commonwealth Evidence Act states that that statute "does not affect the operation of the provisions of any other Act". Secondly, the Commonwealth Evidence Act does not apply to the Supreme Court of Queensland, even in its exercise of federal jurisdiction. That is the result of s 4. Further, and in any event, s 141 of the Commonwealth Evidence Act, to which reference was made in argument, would confirm rather than deny the operation of s 4 of the Crimes Act. Section 141 states that in a criminal

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9 Section 3BB of the Crimes Act, added by the Application of Criminal Code Act, so provides.

10 Inserted by Sched 21 to the Application of Criminal Code Act.

proceeding, the court is not to find the case of the prosecution proved unless it be satisfied of that proof beyond reasonable doubt.

22 The phrase "[s]ubject to ... any other Act" in s 4 of the Crimes Act is apt to identify the Customs Act itself. The submissions neither in this Court nor at first instance or in the Court of Appeal of Queensland took s 4 as their starting point. But that is what s 4 must be. However, the submissions do inferentially speak to s 4. They do so by asserting or denying, according to the stance of the party, the proposition that the Customs Act itself, upon its proper construction, requires no more than the civil standard.

23 In that regard, primary reliance was placed upon ss 244 and 247[11]. Section 244 is the first provision in Pt XIV (ss 244-264), headed, as it has been since the enactment of the statute in 1901, "CUSTOMS PROSECUTIONS". At the relevant time for the purposes of the present appeal, the section stated[12]:

> "Proceedings by the Customs for the recovery of penalties *other than a pecuniary penalty referred to in section 243B* under this Act or for the condemnation of ships, aircraft or goods seized as forfeited are herein referred to as Customs Prosecutions." (emphasis added)

The term "Customs" is defined in s 4 as meaning "the Australian Customs Service".

24 Throughout the life of the Customs Act, Pt XIII has been headed "PENAL PROVISIONS" and has included two Divisions, Div 1 headed "*Forfeitures*" and Div 2 headed "*Penalties*". Section 234 relied upon in the present prosecution is included in Div 2. Other penal provisions are found elsewhere in the Customs Act. Section 33, also relied upon in this prosecution, is an example. The exclusion from s 244 of the pecuniary penalty referred to in s 243B has the effect of excluding the whole of Div 3 (ss 243A-243S) of Pt XIII. Division 3 is headed "*Recovery of Pecuniary Penalties for Dealings in Narcotic Goods*". Section 243B is the central provision in that Division and has no role in this appeal.

25 The prosecution here, as indicated, was instituted in the Supreme Court of Queensland, a step provided for in s 245(1)(a). That sub-section speaks of the

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11 Sections 133 and 136 of the Excise Act are in terms to corresponding effect of ss 244 and 247 respectively. They are found in Pt XI (ss 133-153) headed "EXCISE PROSECUTIONS".

12 Section 244 was repealed and substituted by Sched 3, Item 95 of the *Taxation Laws Amendment (Excise Arrangements) Act* 2001 (Cth).

institution of Customs prosecutions "by action, information or other appropriate proceeding". Here, a writ of summons was employed in the Supreme Court. (Provision also is made in s 245(1) for the institution of proceedings in a State court of summary jurisdiction.)

26 The appellant then relies on s 247. This states:

> "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 the directions of the Court or a Judge."

27 Section 248 also is to be considered. It provides, so far as relevant:

> "*Subject to the provisions of this Act* the provisions of the law relating to summary proceedings in force in the State ... where the proceedings are instituted shall apply to all Customs prosecutions before a Court of summary jurisdiction in a State". (emphasis added)

The opening words of s 248 subject its provisions to s 247. Section 247 applies in its terms to every Customs prosecution in any court referred to in s 245(1), that is to say, superior courts and courts of summary jurisdiction.

28 Upon its proper construction, s 247 requires every Customs prosecution, whatever the court designated in s 245(1) may be, to be commenced, prosecuted and proceeded with in one of the three modes set out in s 247. For present purposes, no question arises respecting the repository of the power of choice apparently conferred by the term "may" in s 247.

29 In his reasons for judgment, Hayne J details the content of the expression in s 247 "rules of practice (if any) established by the Court for Crown suits in revenue matters". Whilst the procedures in the Court of Exchequer and its successors in England[13] appear to have some similarities with criminal procedure, there are dangers in enforcing a system of classification containing but two classes, civil and criminal. So, as Frankfurter J put it[14]:

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13 Including, until 1881, the Exchequer Division of the High Court of Justice and thereafter the Queen's Bench Division: Halsbury, *The Laws of England*, 1st ed, vol 9, §125. See also the judgment of Atkinson J (2000) 179 ALR 563 at 566.

14 *United States ex rel Marcus v Hess* 317 US 537 at 554 (1943). See also *Austin v United States* 509 US 602 at 609-610 (1993).

> "Punitive ends may be pursued in civil proceedings, and, conversely, the criminal process is frequently employed to attain remedial rather than punitive ends."

30 The immediate task is not to ponder what is an imprecise dichotomy but to construe Pt XIV of the Customs Act. This deals on the one hand with the recovery of penalties and on the other with forfeiture. As to forfeitures, the operative order identified is one for condemnation or of dismissal; for penalties it is conviction.

31 There is a long history in this field of distinction between forfeitures and penalties and it is reflected in these provisions of Pt XIV of the Customs Act. The same is true of Pt X of the Excise Act, which, like Pt XIII of the Customs Act, is headed "PENAL PROVISIONS" and deals distinctly with forfeitures and penalties. One outcome of that history in the United States has been that in some decisions civil penalties such as fines have been distinguished from forfeitures so that the latter do not constitute punishments under the double jeopardy clause of the Constitution[15].

32 What is of present importance is that the legislation in respect of contravention of which the appellant sought remedies against the respondents by action commenced in the Supreme Court of Queensland in terms identified offences which upon the establishment of guilt lead to conviction and punishment. The matter of the applicable standard of proof is, upon the proper construction of s 4(1) of the Crimes Act, one of the principles of the common law "with respect to criminal liability".

33 That conclusion is not displaced by anything in the Customs Act, in particular by any of the three branches of s 247. The text of s 247 has been set out earlier in these reasons. The corresponding provision in the Excise Act is s 136. Reference has been made to the first branch of s 247, that dealing with rules of practice in revenue matters. None such were ever established in the Supreme Court of Queensland and, in any event, a displacement of s 4 of the Crimes Act would not be achieved by a "rule of practice". Nor is the third limb of s 247 sensibly to be construed as effecting a displacement of s 4 merely by empowering the giving of a direction by the particular court. Substantive rights are involved. That being so, the second limb of s 247 has no relevant operation. It refers to "the usual practice and procedure of the Court in civil cases". The same construction applies to s 136 of the Excise Act.

34 I agree with what Hayne J says respecting the significance of the averment provisions of both the Customs Act and the Excise Act. I also agree with the

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15 *United States v Ursery* 518 US 267 at 274-288 (1996).

discussion by Hayne J of the nineteenth century English decisions of *Attorney-General v Radloff*[16] and *Attorney General v Bradlaugh*[17], and of the earlier decisions of this Court. It should be added that these and other Australian decisions predate the enactment in 1995 of s 4 of the Crimes Act. Indeed, the state of decision may illustrate a mischief in the federal statute law to which s 4 was directed.

Admissibility of documentary evidence

35 I turn to consider the remaining questions, those concerned with the application of the Queensland Evidence Act. The questions were poorly framed. They appeared wrongly to assume that the Queensland statute might of its own force operate in the exercise of the federal jurisdiction with which the Supreme Court was invested[18]. The questions are best understood as requiring consideration whether any, and if so what, law of the Commonwealth renders the Queensland Evidence Act and, in particular, s 92 thereof, applicable to the proceeding instituted in the Supreme Court by the appellant.

36 Section 92 is stated to apply only in any proceeding which is not a criminal proceeding. The term "criminal proceeding" is defined in s 3 as including a proceeding wherein a person is charged with a simple offence, and an examination of witnesses in relation to an indictable offence.

37 Section 68(1) of the Judiciary Act renders the laws of the State of Queensland respecting the procedure for summary conviction and for trial and conviction on indictment of persons charged with offences against State laws applicable, subject to the balance of s 68 and only in so far as those State laws are applicable to persons charged with offences against the laws of the Commonwealth. Section 92 of the Queensland Evidence Act is not a provision respecting the procedure for the trial of offenders against the criminal law. Therefore, s 68 has no application.

38 Section 79 of the Judiciary Act is expressed more broadly. It is unnecessary to enter into the question of the interrelation between s 68 and s 79. Section 79 renders the laws of Queensland binding on the Supreme Court of Queensland in the execution of federal jurisdiction in Queensland but only in cases to which those State laws are applicable. Further, s 79 operates "except as

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16 (1854) 10 Ex 84 [156 ER 366].

17 (1885) 14 QBD 667.

18 cf *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136.

otherwise provided by ... the laws of the Commonwealth". That exception applies to exclude any application of s 79 to this case.

39 Here, there are other such laws of the Commonwealth which make specific provision for the "picking up" of certain State laws. They are s 247 of the Customs Act and s 136 of the Excise Act. The text of s 247 is set out earlier in these reasons. As there remarked, the section applies to "Customs Prosecutions", a term so defined in s 244 as to include prosecutions for the recovery of penalties for offences against the Customs Act. Likewise, s 136 of the Excise Act applies to "Excise Prosecutions", defined in s 133 to include proceedings for the recovery of penalties under that Act.

40 Section 247 of the Customs Act and s 136 of the Excise Act thereby both contemplate and overcome any incongruity otherwise apparent in the application of s 92 of the Queensland Evidence Act to the prosecution of the present respondents. They do so by stipulating for the prosecution to be proceeded with in accordance with the usual practice and procedure of the Supreme Court of Queensland in civil cases. The question of the admissibility of documentary evidence to facts in issue, the topic dealt with in s 92, falls within the ordinary meaning of the expression "the usual practice and procedure of the [Supreme] Court [of Queensland] in civil cases".

41 For the foregoing reasons, I support the making of the orders proposed by Hayne J.

42 KIRBY J. This appeal concerns questions reserved by the Supreme Court of Queensland relating to the proof of offences against the *Customs Act* 1901 (Cth) and the *Excise Act* 1901 (Cth) with which the respondents have been charged. It presents questions upon which the law does not speak with a clear voice.

The facts, legislation and issues

43 The facts[19] and the course that the proceedings took in the Supreme Court of Queensland[20] are set out in the reasons of Hayne J. So are the relevant provisions of the two Acts of the Federal Parliament that have given rise to the appeal[21]. As there explained, the Acts, and their English predecessors, have a long history in which may be found the seeds of the problems that now fall for resolution[22].

44 The ambivalence of contemporary Australian customs and excise legislation concerning the issues that divided the judges of the Supreme Court of Queensland (from whose orders this appeal comes[23]) resonates, to some extent, with the issues that evenly divided the Court of Exchequer Chamber in England almost 150 years ago[24]. Those issues relate to the classification of particular aspects of proceedings brought for breach of revenue laws.

45 The source of the differences of judicial opinion in 1854 and now is fundamentally the same. It lies in an omission of the legislature to enact provisions that, so far as possible, are unmistakably clear, setting out the rules to be applied in the proof of offences so that there is no doubt as to whether the legal regime applicable is that normally followed in a *criminal* trial or that normally observed in the trial of a *civil* proceeding.

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19 Reasons of Hayne J at [98].

20 Reasons of Hayne J at [99]-[100].

21 Reasons of Hayne J at [101]-[102]. See also reasons of Gummow J at [11]-[13].

22 Reasons of Hayne J at [101]-[107].

23 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2000) 179 ALR 563 (per Atkinson J); *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 188 ALR 493 (per Thomas JA and Byrne J; McMurdo P dissenting in part).

24 In *Attorney-General v Radloff* (1854) 10 Ex 84 [156 ER 366]. See reasons of Hayne J at [118].

46 In England, in 1854, the question was presented in the context of an attempt by the accused's counsel to call the accused himself as a witness in support of the defence case. At that time, that course was forbidden by the general law governing criminal trials. In the present case, two issues of controversy, equally fundamental, were separated for decision. The first was whether, in the proceedings under the two federal Acts alleging offences against the accused, the standard of proof borne by the prosecutor ("the Customs"), in order to establish the elements of the offences, was that ordinarily required in the case of proof of a *criminal* offence (that is, proof beyond reasonable doubt). Or was it the standard ordinarily applied in establishing a *civil* claim (that is, proof on the balance of probabilities; but with appropriate regard to the nature of the proceedings, the issue to be proved and the gravity of the matters alleged[25])?

47 The second issue separated at the trial concerned what provisions of the *Evidence Act* 1977 (Q) would be applied in the prosecution by force of federal law. As re-expressed in this Court, the second issue questioned whether the provisions of that Act applicable to civil cases in Queensland (and in particular s 92 of that Act[26]) were applicable to the trial of the respondents for their alleged offences against the two federal Acts.

48 In the conduct of the respondents' trial, the Supreme Court of Queensland exercises federal jurisdiction. As such, it is required to conform to applicable federal law. However, federal law, in turn, applies to such proceedings the laws of the State concerned, "including the laws relating to procedure [and] evidence … except as otherwise provided by … the laws of the Commonwealth"[27].

49 A third, contingent, issue of a constitutional character was raised defensively by the respondents. The respondents submitted that, if, contrary to their principal argument, this Court was persuaded that, on a proper construction of the federal Acts, proof of their guilt of the elements of the offences alleged against them was to be determined according to the civil standard of proof, such a construction would offend s 71 of the Constitution, be beyond the legislative

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25 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 per Dixon J; cf *Evidence Act* 1995 (Cth), s 140(2). See Anderson, Hunter and Williams, *The New Evidence Law* (2002) at 526-527. In the United States, the *Briginshaw* standard is described as requiring "clear and convincing evidence". It is sometimes expressly provided by law eg *Customs Courts Act of 1980*, 28 USC §2639(b).

26 The *Evidence Act* 1977 (Q), s 92 provides for the admissibility of documentary evidence as to facts in issue "[i]n any proceeding (not being a criminal proceeding)".

27 *Judiciary Act* 1903 (Cth), s 79. See also *Evidence Act* 1995 (Cth), s 64.

power of the Federal Parliament and thus be inapplicable to their proceedings. By this issue, the respondents sought to invoke what they described as a "general guarantee of due process" contained in Ch III of the Constitution[28].

50 In his reasons[29], Hayne J concludes that the questions separated in the Supreme Court should be reworded and, as so expressed, should be answered by making it clear that the "elements of the offence" charged against each respondent respectively under each of the federal Acts in question "must be established beyond reasonable doubt"[30]. His Honour also concludes that the provisions of the *Evidence Act* 1977 (Q) that would be applied in the Supreme Court of Queensland in civil cases[31] (including s 92 of that Act) are to be applied in the trial of the proceedings brought against the respondents in respect of their alleged offences against the federal Acts. In light of the first of these conclusions, in which the other members of the Court join, the constitutional issue does not arise for decision.

Common ground and points of difference

51 Upon certain matters, I fully agree in the reasons of Hayne J and also in the separate reasons of Gummow J. First, it is clear that the *Evidence Act* 1977 (Q) cannot of its own force, in any circumstances, apply to proceedings against the respondents under the *Customs Act* or the *Excise Act*. Those statutes are federal laws. The court hearing proceedings under them is exercising federal jurisdiction. It can only apply State law to such proceedings with the authority of federal law[32]. The terms in which the questions concerning the *Evidence Act* 1977 (Q) were expressed appear to assume otherwise. They must therefore be amended. The answer given must reflect this basic feature of our constitutional arrangements.

52 Secondly, the questions to be answered require close examination of the applicable laws, most especially the terms, and intended operation, of the

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28 Relying on *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 per Deane J; *Dietrich v The Queen* (1992) 177 CLR 292 at 326, 362 and McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235 at 238-240.

29 With which Gleeson CJ and McHugh J agree.

30 Reasons of Hayne J at [150].

31 That is, in the exercise of State jurisdiction.

32 Reasons of Gummow J at [35]-[40]; cf *R v Gee* (2003) 77 ALJR 812; 196 ALR 282.

Customs Act and the *Excise Act*. A strict dichotomy between "criminal" and "civil" proceedings is not always observed in Australian legislation. In the end, what is necessary is a conclusion about the requirements of the statutes principally in question and how they are intended to operate. As Hayne J has demonstrated, the history of revenue statutes (of which the *Customs Act* and the *Excise Act* are modern examples) indicates that sometimes proceedings under them take on features normal to the general rules governing criminal and sometimes civil trials. Generalities, unconnected with the specific provisions of the two federal Acts, may fall short of providing the solutions called for in this appeal.

53 On the other hand, in the end, on the first issue, it is necessary to classify the subject proceedings in a general way. This task can only be accomplished by reference to the usual features of criminal, as distinct from civil, proceedings. In Australia, one such usual feature is that normally a proceeding resulting in a "conviction" is classified as criminal. To secure such a "conviction" the prosecutor must accept the burden to prove all of the elements of the alleged offence by a standard of proof described as "beyond reasonable doubt".

54 Thirdly, as Gummow J points out[33], the *Judiciary Act* 1903 (Cth) does not contain the provision specifying the common law to be applied to the proceedings brought, in this case, under federal statutory law and tried in a Queensland court exercising federal jurisdiction[34]. It was s 4 of the *Crimes Act* 1914 (Cth)[35], as applicable at the time of the alleged offences, that governed the law as to the "criminal liability" of the respondents. It provided that, subject to federal law, such "criminal liability" was to be determined in accordance with "the principles of the common law". I agree with Gummow J that the usual principles as to burden and standard of proof of a criminal charge are, within s 4 of the *Crimes Act*, "principles of the common law with respect to criminal liability". They were therefore picked up and applied by s 4 of the *Crimes Act* to the liability of the respondents in the prosecutions brought against them for customs and excise offences. This was so by force of federal legislation specifically so providing.

55 This is the starting point for ascertaining the answer to the separated questions. Section 4 of the *Crimes Act* cannot be ignored because, the relevant law having been enacted in statutory form with particularity and by the Federal Parliament, it must be obeyed as the source of the law governing the case. It

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33 Reasons of Gummow J at [15].

34 Whether the *Judiciary Act*, ss 68, 79 or 80 or otherwise.

35 Set out in reasons of Gummow J at [16].

cannot be overridden, varied or altered by the more general provisions of the *Judiciary Act* which, in any case, take the reader back to the particular terms of s 4 of the *Crimes Act*. In so far as there is a difference between Gummow J and Hayne J[36] on this point, I prefer the opinion that Gummow J has expressed.

56 There remains one matter upon which I would depart from the reasons of Hayne J. This relates to the view stated concerning the significance of the penal consequences of customs and excise prosecutions for the classification of such proceedings. His Honour concludes that characterising the particular forms of relief sought in particular proceedings as "penal" offers little or no assistance in deciding what standard of proof is to be applied[37]. I accept that statutory penalties exist that represent a kind of hybrid, lying somewhere between compensation, restitution and restoration (the usual business of *civil* process) and punishment and public denunciation (the usual business of *criminal* process). However, where the remedy provided envisages a public "conviction" of an "offence" and the imposition of a "penalty", which in some circumstances in the case of a natural person is backed up by the possibility of imprisonment, it is easier than otherwise to come to a conclusion that the proper classification of the proceedings is criminal. This is especially so when such proceedings are contrasted with proceedings in which the legal sanctions involve reparation to a party, such as in the form of a money payment. In our form of society, loss of liberty as a punishment, in particular, is ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide.

Three elements of hesitation

57 Putting these considerations to one side, three matters cause me to hesitate before embracing the conclusions reached by the other members of this Court. They are:

(1) That the answers proposed to the first two separated questions, as reframed, appear to conflict with holdings or assumptions expressed by Justices of this Court concerning the standard of proof applicable to establishing the elements of the offences charged in such trials and to be inconsistent with the trend of authority in other Australian courts deciding that issue;

(2) That the answers to the first two questions appear, upon one view, to contradict the express instruction of the Federal Parliament in s 247 of the

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36 See reasons of Hayne J at [134].

37 Reasons of Hayne J at [139].

Customs Act (and the equivalent provisions of the *Excise Act*[38]) requiring (with emphasis added) that every such prosecution in a court may be "proceeded with … in accordance with the usual practice and procedure of the Court in *civil* cases"; and

(3) That the apparent discordancy of the answers provided to the first two questions and the terms of the legislation is given emphasis by the answers proposed to the third and fourth questions. Thus, if the proper understanding of the federal Acts and decisional law is to the effect that the standard of proof for the establishment of the elements of the offence is, where a conviction is sought, the *criminal* standard (beyond reasonable doubt), it seems odd that the State evidence law governing *civil* cases is rendered applicable by federal law to the trial of such offences in a State court, including in a case in which that State law expressly excludes its application to "a criminal proceeding"[39].

58 I shall deal with each of these concerns in turn.

The state of decisional authority

59 *Earlier court decisions*: The starting point for an examination of the first hurdle is an appreciation that the question for decision has not, as such, previously arisen for resolution by this Court.

60 It is true that on a number of occasions the issue has been "touched upon" by Full Courts of this Court[40] in proceedings concerned with legislation other than the two federal Acts under consideration in this appeal. Those two Acts, being amongst the earliest statutes passed by the Federal Parliament, were the source of a template that was copied, with minor variations, in a number of later federal statutes[41].

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38 s 136.

39 *Evidence Act* 1977 (Q), s 92.

40 *Naismith v McGovern* (1953) 90 CLR 336 at 340-341.

41 eg *Sales Tax Assessment Act (No 1)* 1930 (Cth), s 57 (repealed); *Income Tax Assessment Act* 1936 (Cth), s 237 (repealed); *Pay-roll Tax Assessment Act* 1941 (Cth), s 53; *Stevedoring Industry Charge Assessment Act* 1947 (Cth), s 46 (repealed); *States Receipts Duties (Administration) Act* 1970 (Cth), s 72 (repealed).

61 In *Naismith v McGovern*[42] and in *Mallan v Lee*[43], the Full Court of this Court considered the nature and incidents of the offences created by s 230 of the federal income tax legislation. That section provided offences against that legislation in some ways similar to those in question here. Nevertheless, the precise questions decided in *Naismith* and *Mallan*, both as a matter of legal authority and of substance, were different from the questions that must now be resolved. The present questions concern the *Customs Act* and *Excise Act* and the different attributes of the proceedings for which they respectively provide.

62 This said, it is fair to state, as the Customs did, that much decisional law, in this Court[44], by a Justice before his appointment to this Court[45], by intermediate appellate courts[46] and by single judges after careful examination of authority[47], has concluded that the standard of proof applicable to prosecutions of offences of the kind in question is the *civil* and not the *criminal* standard.

63 True, there are contrary indications in the course of this judicial authority. The penal features of the statutory language ("offence", "prosecution"), the nature of the consequences ("conviction") and the public purposes of the applicable law have led some judges to contrary conclusions concerning the standard to be applied to the proof of the elements of the offence. In a number of instances where the question of the standard of proof arose in this Court,

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42 (1953) 90 CLR 336.

43 (1949) 80 CLR 198.

44 eg *R v McStay* (1945) 3 AITR 209 at 212; *McGovern v Hillman Tobacco Pty Ltd* (1949) 4 AITR 272 at 275.

45 *Jackson v Butterworth* [1946] VLR 330 at 332 per Fullagar J; *Jackson v Gromann* [1948] VLR 408 at 411 per Fullagar J.

46 eg *Evans v Lynch* [1984] 3 NSWLR 567 at 570; *Evans v Button* (1988) 13 NSWLR 57 at 73-75; *Bridal Fashions Pty Ltd v Comptroller-General of Customs* (1996) 17 WAR 499 at 503; *Wong v Kelly* (1999) 154 FLR 200 at 209-210 [57]-[64]; *Chief Executive Officer of Customs v Jiang* (2001) 111 FCR 395 at 414-415 [77]-[80], 415 [82], 415-416 [86]-[87]. Some of these cases concern prosecutions in summary jurisdictions upon which see *Customs Act*, s 245(1).

47 eg *Button v Evans* [1984] 2 NSWLR 338 at 349-353; *Comptroller-General of Customs v Jayakody* unreported, Supreme Court of Victoria, 9 November 1993 per Byrne J; *Chief Executive Officer of Customs v Amron* (2001) 164 FLR 209 at 226 [59]-[60]; *Chief Executive Officer of Customs v Nasher* (2002) 130 A Crim R 148; *Chief Executive Officer of Customs v Australian Petroleum Supplies Pty Ltd* [2002] VSC 223.

individual Justices have held, or assumed, that the criminal standard would apply to the proof of the offence[48]. There are suggestions of similar opinions in dicta in this Court concerning the approach to be taken to penal laws generally[49]. There are like remarks of an explicit[50] and implicit[51] character in other courts. I emerge from a reading of these authorities without a conviction that they point in a consistent direction.

64 *Opinion in the Brabham case*: This lack of clarity in judicial authority has not changed in the 15 years since I last considered the features of a "Customs prosecution for the recovery of a penalty". Re-reading what I said in *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce*[52] ("*Brabham*"), I see no reason to alter the opinion expressed there. Indeed, the intervening years, and many more cases, have reinforced the conclusion I then stated[53]:

> "[F]or some purposes the nature of a Customs prosecution for the recovery of a penalty may be assimilated to civil process (as s 247 contemplates). However, that does not stamp on such proceedings, for all purposes, the badge of a civil action. It could scarcely be so, having regard to the nature of such proceedings, for the reasons pointed out by Mahoney JA in *Evans v Button*[54]. A long series of cases, including in the High Court of Australia, dealing with s 247 and its equivalents in other statutes had made

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48 *Henty v Bainbridge-Hawker* (1963) 36 ALJR 354 per Owen J (the relevant extract, not there reproduced, is noted in *Button v Evans* [1984] 2 NSWLR 338 at 351); *Scott v Geoghegan & Sons Pty Ltd* (1969) 43 ALJR 243 at 246 per Taylor J.

49 eg *R v Associated Northern Collieries* (1910) 11 CLR 738 at 741; *Wilson v Chambers & Co Pty Ltd* (1926) 38 CLR 131; *R v Adams* (1935) 53 CLR 563 at 567-568; *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Waugh v Kippen* (1986) 160 CLR 156 at 164.

50 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 85 A Crim R 517 at 523.

51 *Murphy v KRM Holdings Pty Ltd* (1985) 8 FCR 349 at 353-354; *Ludwigs Canberra Bond Cellar Pty Ltd v Sheen* (1982) 46 ACTR 13 at 23; *Research and Development Engineers Pty Ltd v Lanham* (1983) 49 ALR 351 at 365; *Stitt v CBI Constructors Pty Ltd* (1990) 93 ALR 325 at 339.

52 (1988) 85 ALR 640.

53 (1988) 85 ALR 640 at 652.

54 (1988) 13 NSWLR 57 at 73.

> the point that the section has a hybrid characteristic[55]. Thus the fact that … proceedings for the recovery of a statutory penalty do not amount to a 'criminal cause or matter' cannot determine the question now before this court … In many cases the distinction between civil and criminal proceedings will be academic as it was in *McGovern v Hillman Tobacco Pty Ltd*[56]".

65 In *Brabham*, the Court of Appeal of New South Wales was not concerned with the applicable standard of proof. Instead, it had to identify the character of the proceedings for the purpose of deciding the rule applicable to an accused's application for a stay of prosecution on the ground that its continuance was oppressive or unjust. According to authority, accepted in that case, such a stay might be granted in civil[57] as well as criminal proceedings. However, because, in the case of civil proceedings, it was normal to invoke a statute of limitations (such as exists for prosecutions under the *Customs Act*[58]), and because of the other incidents of civil proceedings, courts are more reluctant to provide stays in such proceedings than in criminal proceedings found oppressive or unjust.

66 It was in the context of the classification of the proceedings in *Brabham* for that purpose that I remarked[59]:

> "… I do not consider that s 247 alters the fundamental nature of the present proceedings. They remain proceedings based upon provisions found amongst the penal provisions of the Act. They are brought to recover penalties for 'offences'. Such penalties are imposed when a person is found 'guilty' of an 'offence' which is 'punishable' upon 'conviction'. The offences are expressed in terms of criminal wrongdoing. At the relevant time, the conviction, although not immediately resulting in a risk of imprisonment, could lead on to loss of liberty for a second conviction. Conviction necessarily involves public opprobrium and condemnation for such an offence *is one against the public law*[60]. Seeking to characterise these proceedings for the purpose of the application of the relevant rule for

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55 *R v Associated Northern Collieries* (1910) 11 CLR 738 at 741.

56 (1949) 4 AITR 272 at 275 per Williams J (HC).

57 *Birkett v James* [1978] AC 297; *Stollznow v Calvert* [1980] 2 NSWLR 749; *Herron v McGregor* (1986) 6 NSWLR 246 at 253 per McHugh JA.

58 *Customs Act*, s 249.

59 *Brabham* (1988) 85 ALR 640 at 653 (original emphasis).

60 *Evans v Button* (1988) 13 NSWLR 57 at 74 per Mahoney JA.

> a stay for abuse of process, they are much more closely akin to criminal proceedings, properly so called, than to purely civil litigation between parties."

67 *Brabham*, and many decisions before and since (including in this Court), illustrate the importance of the point upon which Hayne J insists in his reasons in this case. With it I agree. Given the ambivalent elements in the provisions of the federal Acts in question (and what I call the "hybrid" characteristics of the proceedings envisaged in the two Acts), two important considerations must be kept in mind. The first is that it is erroneous to seek "to classify proceedings as either 'criminal' or 'civil' such that never the twain would meet"[61]. The two categories do not cover the relevant universe[62]. Secondly, in applying particular rules or procedures characteristic of criminal or civil proceedings to the provisions of the federal Acts (or in deriving inferences from the legislation as to the availability or unavailability of such rules or procedures) it is essential to address the precise question that has to be resolved. There is no universal approach that can be adopted whatever the question in issue or the procedure to be classified. In each case, it is necessary for the identified purpose to focus attention on the precise statutory language.

68 *Conclusion – an open question*: It follows that, although I would be prepared to concede that much previous judicial authority, probably a preponderance of it, supports the Customs' submission that the standard of proof to be applied in the prosecutions of the respondents is the standard applicable in civil cases, no binding rule of this Court so holds. Conflicting opinions have been expressed on the point, including in this Court. Accordingly, it is necessary to resolve the controversy in the usual way. This means starting with the requirements of the legislative language. To the extent that that language is ambiguous or uncertain, regard may be had to analogous developments of the law and to relevant considerations of legal principle and legal policy[63].

Requirements of the statutes and legal policy

69 *Requirements of the Acts*: The provisions of s 247 of the *Customs Act* (and the equivalent provisions in the *Excise Act*[64]) obviously contain a critical

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61 *Brabham* (1988) 85 ALR 640 at 650.

62 Reasons of Gummow J at [30]; reasons of Hayne J at [114].

63 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 53 [67]; 192 ALR 561 at 578-579 ("*Daniels Corp*").

64 s 136.

instruction of the Parliament concerning the approach that is to be taken to prosecutions of the kind involved in these proceedings. So long as the provision in the law is constitutionally valid (a question contingently raised by the respondents) it is the duty of courts to give effect to it. Consonant with authority, they may do so with greater confidence because the provision relates to the conduct of prosecutions "in a court". In terms, provisions such as s 247 accord a large measure of control over the prosecution to the "Court or a Judge" concerned. Legislation of this kind is normally given an ample interpretation because of the designated repository of the stated powers[65].

70 Three other features of the language of s 247 are relevant to the approach to be taken to its ambit. The first is the very broad scope of the section which applies to "[e]very Customs prosecution in a court".

71 Secondly, the section, on its face, reflects both its historical origins[66] and the residual provision it makes for the observance of "the usual practice and procedure of the Court in civil cases". Without knowing of the history of prosecutions in revenue cases for debts to the Crown, the instruction of s 247 of the *Customs Act*[67] would seem remarkable, even astonishing. This is because, normally, one would expect that the statutory features and the predominantly penal character of such prosecutions would attract the general rules of practice and procedure observed in criminal cases. The history of Crown revenue law helps to explain the origins of s 247 (and its equivalent in the *Excise Act*). But it does not diminish the exceptional particularity of the provision by which the Parliament has stated its will.

72 Thirdly, there never having been in this country rules established for Crown suits in revenue matters and no particular directions having been given by the court or a judge in the respondents' proceedings, attention is focussed on the remaining phrase in s 247. This is the portion of the section that would ordinarily be applied and which applies to this case. In terms, it imports into prosecutions, such as those commenced in these proceedings, "the usual practice and procedure of the Court in civil cases". The issue, so far as this legislative

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65 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185-191, 202-203, 205; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421; *CDJ v VAJ* (1998) 197 CLR 172 at 201 [110]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423-424 [110].

66 In its reference to "rules of practice (if any) established by the Court for Crown suits in revenue matters". This is explained in the reasons of Hayne J at [118].

67 And of its equivalent in the *Excise Act*, s 136.

instruction is concerned, is whether the standard of proof applicable to the establishment of the elements of the offence falls within that phrase.

73 With Hayne J[68], I would accept that the topic of the standard of proof in legal proceedings is one that is quite commonly addressed in Australian law as an aspect of the law of evidence. It is so treated in the *Evidence Act* 1995 (Cth)[69]. There are similar provisions in earlier federal legislation. Thus s 79 of the *Judiciary Act*, providing for the applicability of State and Territory laws to courts exercising federal jurisdiction, enacts that such "laws relating to procedure, evidence, and the competency of witnesses, shall … be binding on all Courts". In federal legislation, the specified subjects have long been treated as aspects of adjectival law, suitable on the face of things to be "picked up" and applied in federal proceedings.

74 However, it is at this point that I feel the hesitation that I have expressed to embracing the reasoning of Hayne J. When I take into account the scope of the language of s 247 (and its equivalent in the *Excise Act*), the words used, the historical and unusual content of the legislative instruction, the power it gives to the courts and the setting of the provisions in federal statute law more generally, I find it difficult to say that this particular aspect of the adjectival law of evidence (the standard of proof) cannot, as a matter of language, be included in the phrase "the usual practice and procedure of the Court in civil cases". Unlike Hayne J[70], I do not regard the words in the section that surround the reference to "the usual practice and procedure of the Court" as throwing much light on the meaning of the critical phrase.

75 I accept (as the cases demonstrate) that the intended ambit of "the usual practice and procedure of the Court in civil cases" is not beyond doubt. In one sense, the determination of the standard of proof in a particular proceeding is a matter of evidence law and thus of "practice and procedure". Yet in another sense it is something more fundamental[71]. It relates to the very character of the proceeding. It is not a matter of detail for the carrying on of the proceeding. It is an attribute of the proceeding that ultimately governs the evaluation of the accusation when the evidence for the prosecution is completed. In this sense, it concerns substantive criminal liability.

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68 Reasons of Hayne J at [122].

69 Pt 4.1 (ss 140-142).

70 Reasons of Hayne J at [125].

71 See reasons of Gummow J at [17], [32] where he discusses common law principles of criminal liability.

76 Whilst the assignment of the burden of proof and the identification of the standard of proof can be of critical importance to the *conduct* of the trial, thereby partaking of certain features of "practice and procedure", each is also, arguably, something more than that because each affects, in a way, the very character of the trial. Each is therefore arguably more than simply a matter of "practice and procedure". This is a chief consideration that ultimately causes me to agree with Gummow J[72] that "[s]ubstantive rights are involved".

77 What is the proper way to resolve what I accept to be an ambiguity in the statutory reference to the "usual practice and procedure of the Court"? The resolution is not to be found within the four corners of the section. Nor is it to be discovered in the verbiage of the surrounding sections. Gummow J and Hayne J each look to principles of the common law, consideration of which is required by s 4 of the *Crimes Act*[73] or otherwise[74]. In my view, the ambiguity is to be resolved with the assistance of larger considerations of legal principle and policy, the guidance afforded to this Court by its recent approach to an analogous question and a consideration of the fact that the Parliament omitted to address the issue that now falls for decision, although it had a perfect opportunity to do so.

78 *Abrogation of basic entitlements*: This Court has consistently held that, to deprive a person of a fundamental right or privilege recognised by the law, clear legislative provisions are required. This is especially so where that right or privilege may be viewed as a basic doctrine of the law[75] or, in effect, a "practical guarantee of fundamental rights"[76] and something more than a mere rule of evidence law applicable in proceedings[77]. In part, this approach to statutory meaning arises from the respect that courts accord to the legislature assuming, as they do, that the Parliament would not intend drastic consequences for ordinary civil entitlements without expressly considering and approving them. In part, the

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72 Reasons of Gummow J at [33]. See also reasons of Hayne J at [133].

73 Reasons of Gummow J at [32].

74 Reasons of Hayne J at [134].

75 *Goldberg v Ng* (1995) 185 CLR 83 at 121 per Gummow J (diss); *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 505, 551-552.

76 *Goldberg v Ng* (1995) 185 CLR 83 at 121.

77 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.

rule derives from a judicial recognition that "vigilance is required against accidental and unintended erosions of the right"[78].

79 From its earliest days[79] and in many cases decided since its establishment[80] right up to the present time[81], this Court has insisted upon this approach. Thus, in *Cassell v The Queen*[82], I relied upon it to support an elementary proposition in the context of criminal liability:

> "It is a fundamental principle of the criminal law in Australia that, save for those rare exceptions where a legislature has provided otherwise, the burden rests on the prosecution to prove beyond reasonable doubt every element necessary to establish the criminal offence charged. No authority is required for this proposition. This Court has a duty to safeguard the principle against attempted erosion.
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> … Other legal systems have adopted different institutions, rules and procedures for the conduct of criminal trials. These may sometimes appear more rational, effective and efficient. But the high measure of individual liberty which is enjoyed in Australia is, in part, attributable to the stringent limits which the law places upon the state when it prosecutes an individual for a crime. It must then prove every fact necessary to support the legal elements of the offence."

80 It might be said that the differentiation between the civil and criminal standard of proof is a peculiarity of the common law and, unlike other features of criminal process, cannot be regarded as a matter of basic doctrine or of

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78 *Daniels Corp* (2002) 77 ALJR 40 at 56 [85]; 192 ALR 561 at 583. See also *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523.

79 *Potter v Minahan* (1908) 7 CLR 277 at 304.

80 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; *Coco v The Queen* (1994) 179 CLR 427 at 435-438.

81 eg *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 328 [121]; *Daniels Corp* (2002) 77 ALJR 40 at 59-60 [105]; 192 ALR 561 at 588.

82 (2000) 201 CLR 189 at 194 [24]-[25].

fundamental human rights. For example, the International Covenant on Civil and Political Rights[83] provides that[84]:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

This provision is not, as such, part of Australian municipal law. It may influence the developments and exposition of the law[85]. Yet the words used leave unanswered the characterisation of the "offences" for which the respondents have been prosecuted and the particular question of the burden and standard of proof required in establishing such offences.

81 Because it would be normal in Australian law to expect that an "offence", the subject of "prosecution" with serious consequences for a person convicted[86], would be proved beyond reasonable doubt, a provision depriving the party accused of that normal protection is one that, potentially, affects basic civil entitlements. It is therefore a matter upon which the legislature may be expected to speak clearly and unequivocally. It follows that general words, such as those appearing in s 247 of the *Customs Act* (and the equivalent provision in the *Excise Act*), will not suffice to work such a deprivation.

82 *Analogous decision in Daniels Corp*: The recent decision of this Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[87] ("*Daniels Corp*") illustrates the approach that the Court takes to the construction of federal legislation which is propounded to abrogate an important right, privilege or immunity[88]. Self-evidently, the standard of proof

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83 Done at New York on 19 December 1966, 1980 *Australia Treaty Series* 23. Entered into force for Australia 13 November 1980 in accordance with Art 49.

84 Art 14.2. I have not overlooked the question whether the rights stated in the ICCPR apply to corporations such as the first respondent. The *Customs Act* certainly applies without differentiation to natural persons as well as to legal persons such as the first respondent and the point remains good as one of legal principle.

85 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

86 Both under the *Customs Act* and the *Excise Act* and also, as Hayne J points out, under the Constitution and other laws. See reasons of Hayne J at [138].

87 (2002) 77 ALJR 40; 192 ALR 561.

88 (2002) 77 ALJR 40 at 43 [11], 49 [43], 60 [106], 65-66 [132]; 192 ALR 561 at 565, 573, 588-589, 596.

applicable to the trial of a "prosecution" for an "offence" against the Acts in question in these proceedings will often be critical to the success or failure of the prosecution. Many a criminal prosecution is won or lost on arguments concerned with the proof, or failure of proof, of the elements of the offence. The enactment of provisions facilitating the proof of offences under the two federal Acts by the averment of matters in the originating process[89] increases rather than diminishes the significance of the standard of proof which the law demands of the prosecutor to achieve success.

83 Therefore, in the context of a statutory prosecution said to relieve the prosecutor of the burden which the law would usually impose upon a "prosecutor" for proof warranting "conviction" of an "offence", clear statutory language is required. This is what this Court held in *Daniels Corp*. Like the first respondent, the complaining party in that appeal was a corporation. But the legal principle was held equally applicable to such a case[90]. In many respects, the principle of law that assigns to a prosecutor the burden of proving an offence to a standard beyond reasonable doubt is even more fundamental to the rights of an accused than the facility of legal professional privilege, the purported abrogation of which was in issue in *Daniels Corp*.

84 It follows that, consistently with the recent and unanimous opinion of this Court in that case, the general language of s 247 relied upon by the Customs in this appeal did not abrogate the criminal standard of proof in the case of these prosecutions.

85 Even before *Daniels Corp* was decided, McHugh J in *Witham v Holloway*[91] (admittedly in a context different from this) said that "contemporary notions of justice" would be offended if a party were to be punished, including by imprisonment, for failure to comply with an order "the breach of which has only been proved on the balance of probabilities". Where, as in the present case, punishment and public opprobrium attach, with other consequences, to a successful prosecution under the *Customs Act* and the *Excise Act*, it can equally be said that contemporary notions of justice would be offended if such results could flow, without clear authority of law, by proof of an "offence" on the

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89 *Customs Act*, s 255(1); *Excise Act*, s 144(1). See reasons of Hayne J at [141].

90 *Daniels Corp* (2002) 77 ALJR 40 at 60 [108]; 192 ALR 561 at 589 applying *R (Morgan Grenfell & Co Ltd v Special Commissioner of Income Tax* [2003] 1 AC 563.

91 (1995) 183 CLR 525 at 548. See also *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134 at 139; *Waugh v Kippen* (1986) 160 CLR 156 at 164; *Piper v Corrective Services Commission of NSW* (1986) 6 NSWLR 352 at 361.

balance of probabilities. What is in issue is more than the words of the legislation. In issue is the substance of the prosecutor's obligation if it wishes to secure outcomes so harmful to an accused.

86 *Failure of legislative reform*: A third consideration reinforces this conclusion. Although the Federal Parliament has had ample opportunity to clarify, so far as it could, the issue now under consideration, it has failed to do so[92]. Although the *Customs Act* and the *Excise Act* have been regularly amended since the predecessors to the general provisions invoked by the Customs were enacted, no occasion has been taken to remove the uncertainty. It is an uncertainty evidenced by countless judicial remarks, including in this Court.

87 When the *Evidence Act* 1995 (Cth) was enacted, the opportunity was not taken, by way of cross-reference to Pt 4.1 of that Act ("Standard of proof"), to put at rest the doubts that had been expressed in the course of many decisions. Even more striking is the failure of the Parliament to address those doubts when the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 (Cth) was before it.

88 In the Explanatory Memorandum[93] distributed with that Bill, the Minister explained that the proposed s 5AA of the new federal *Criminal Code* did not apply to offences against the *Customs Act*. This distinction was justified on the basis of the "unusual nature" of most such offences. The Minister pointed out that whilst some offences against the *Customs Act* were "purely criminal in nature, such as the narcotic drug import and export offences under Part XIV of the Act", there were other offences that involved "monetary penalties". These, she said, were dealt with differently in accordance with the choice of the court in which they were tried[94]. The Minister noted the exception of Queensland (inferentially, a reference to these proceedings). She acknowledged that the resulting "anomaly is not logical". She promised future review of "these offences" making explicit reference to ss 247 and 248 of the *Customs Act*. The Minister went on[95]:

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92 Australian Law Reform Commission, *Customs and Excise*, Report No 60, (1992), vol II at 171 [14.13].

93 Australia, Senate, Explanatory Memorandum, Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 (Senator Vanstone) at 164 [595].

94 cf *Customs Act*, s 245(1).

95 Australia, Senate, Explanatory Memorandum, Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 at 164 [595].

> "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 … At the same time the provision will not apply Parts 2.4, 2.5 and 2.6 of Chapter 2 … 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 [of the *Criminal Code*]. 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."

89 When the Parliament had the opportunity, as it did in 2000, to remove the uncertainties and the acknowledged "anomalies", and omitted to do so, it is specially appropriate for this Court to apply the basic principle reaffirmed in *Daniels Corp*. To apply that principle in such a case is, in effect, to require the Parliament, if it wishes to have a lesser standard of proof in revenue prosecutions, to address explicitly the issue which the parties have argued before this Court. Such an obligation obliges the Parliament to determine the important issues of principle involved. It is then the Parliament, not the courts, that accepts the responsibility (as it should) for any enacted departure from the basic legal principle that ordinarily applies to proof of the elements of penal offences. Where, so recently, the Parliament has failed to shoulder that responsibility, I see no reason why this Court should do anything to relieve it of its obligation.

90 *Conclusion – the criminal standard*: It follows that the general language of s 247 of the *Customs Act* (and s 136 of the *Excise Act*) is not sufficient to relieve the prosecutor in a prosecution of the offences in question in these proceedings of the standard of proof normally applicable to the proof of the elements of an "offence". That subject does not fall within the "usual practice and procedure of the Court in civil cases". If the general principle of the common law governing criminal liability is to be altered in this respect for prosecutions under the *Customs Act* or the *Excise Act*, clear and express legislation is necessary. No such alteration has occurred.

Application of the *Evidence Act* 1977 (Q)

91 This leaves the apparent discordancy between the foregoing conclusion and the conclusion that s 247 of the *Customs Act* and s 136 of the *Excise Act* operate to pick up and apply to the federal jurisdiction invoked in this case those provisions of the *Evidence Act* 1977 (Q) that would apply in *civil* cases in the Supreme Court of Queensland if that Court were exercising State jurisdiction.

92 On this question I agree with Gummow J and Hayne J[96]. I also agree with the views expressed in the Court of Appeal by McMurdo P[97]. There is no reason why, in this respect, the general provisions of the respective federal Acts do not apply according to their terms, which are clear in their expression. The applicable law of evidence clearly represents a matter of "practice and procedure". If there is a resulting apparent discordancy between the answers to the reserved questions it is one mandated by the terms of the applicable federal legislation, properly understood.

The constitutional argument does not arise

93 The conclusion on the applicable standard of proof makes it unnecessary to consider the constitutional argument raised by the respondents only in the context of the questions concerning the standard of proof. As those questions are resolved in favour of the respondents, I will refrain from addressing the constitutional argument.

Orders

94 I agree in the orders proposed, and the answers to the questions contained, in the reasons of Hayne J.

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96 Reasons of Gummow J at [40]; reasons of Hayne J at [146]-[148].

97 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 188 ALR 493 at 504-505 [36].

95 HAYNE J. After federation, the *Customs Act* 1901 (Cth) and the *Excise Act* 1901 (Cth) were among the first Acts passed by the new Parliament of the Commonwealth. (They were Act Nos 6 and 9 of 1901.) Part XIV of the *Customs Act* provided for what it called "Customs Prosecutions". Section 244 of the *Customs Act* provided that:

> "Proceedings by the Customs for the recovery of penalties under this Act or for the condemnation of ships or goods seized as forfeited are herein referred to as Customs Prosecutions."

Part XI of the *Excise Act* made equivalent provisions for "Excise Prosecutions"[98].

96 The provisions regulating Customs prosecutions and Excise prosecutions have been amended in various ways since they were first enacted, and it will be necessary to notice some of those amendments. In all fundamental respects, however, the scheme of the provisions has remained unchanged.

97 The central issues in this appeal concern what standard of proof is to be applied in proceedings of this kind and what statutory provisions regulate the admissibility of evidence tendered in them. Resolution of those issues will require reference to some historical matters. Before dealing with those matters it is necessary to record the steps that have been taken in the present proceedings.

The present proceedings

98 The appellant (whom it is convenient to refer to simply as "the Customs") commenced proceedings in the Supreme Court of Queensland by writ of summons. The three respondents in the present appeal were named as defendants. By its amended statement of claim the Customs sought (i) declarations that each of the respondents was "liable to conviction for offences" contrary to identified sections of the *Customs Act* and *Excise Act*, (ii) "[t]he conviction of the first, second and third [respondents]" for offences contrary to those sections of the *Customs Act* and *Excise Act*, (iii) "[a]n order for recovery of penalties" against the respondents pursuant to those Acts, (iv) "[a]n order pursuant to s 21B of the *Crimes Act* 1914" that the respondents "make reparation to the Commonwealth of Australia", and (v) costs and further or other relief. The respondents filed a defence to this amended statement of claim.

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98 Section 133 of the *Excise Act* 1901 provided that "Proceedings by the Customs for the recovery of penalties under any Excise Act or for the condemnation of goods seized as forfeited are herein referred to as Excise Prosecutions." In both the *Customs Act* and the *Excise Act*, the proceedings are referred to as "Customs prosecutions" and "Excise prosecutions" in all except the provisions defining the terms, but nothing turns on this oddity.

99 The parties then joined in seeking, and obtaining, an order[99] for the separate trial of certain questions before trial of the action. Two questions concerned the standard of proof; two concerned the application of the *Evidence Act* 1977 (Q) to the proceedings. It is important to notice the form of the questions. The questions about standard of proof asked "What is the standard of proof required of [the Customs] ... in order for [it] to obtain convictions for offences" against, in the one case, specified provisions of the *Customs Act* and, in the other, specified provisions of the *Excise Act*. That is, the questions assumed that the Customs was entitled to the second form of relief sought in the amended statement of claim, namely, conviction of the respondents for offences against the *Customs Act* or *Excise Act*. The questions about the *Evidence Act* asked whether the proceedings were "criminal proceedings for the purposes of the *Evidence Act*".

100 At first instance[100], Atkinson J ordered that the questions about standard of proof should be answered "the civil standard of proof" and that the questions about the *Evidence Act* should be answered "no". The present respondents appealed to the Court of Appeal of Queensland. That Court held[101], by majority (Thomas JA and Byrne J, McMurdo P dissenting), that the appeal should be allowed, the questions about standard of proof be answered "Proof beyond reasonable doubt", and the questions about the *Evidence Act* be answered "yes".

Some matters of history

101 Provisions of the kind found in Pt XIV of the *Customs Act* and Pt XI of the *Excise Act* have a long history. Their antecedents lie in England, in proceedings in the Exchequer for recovery of sums owed to the Crown. Sections 245 and 247 of the *Customs Act* (and their equivalent provisions in the *Excise Act*[102]) allude to that history. As originally enacted, s 245 of the *Customs Act* provided that:

> "Customs prosecutions may be instituted in the name of the Minister by *action information or other appropriate proceeding* –

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99 Pursuant to Ch 13, Pt 5 of the Uniform Civil Procedure Rules 1999 (Q).

100 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2000) 179 ALR 563.

101 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2001) 188 ALR 493.

102 ss 134 and 136.

(a) In the High Court of Australia; or

(b) In the Supreme Court of any State;

and when the prosecution is for a pecuniary penalty not exceeding Five hundred pounds or the excess is abandoned the Customs prosecution may be instituted in the name of the Collector in

(c) Any County Court District Court Local Court or Court of summary jurisdiction."

Section 247, as originally enacted, provided:

"Every Customs prosecution in the High Court of Australia or the Supreme Court of any State may be commenced prosecuted and proceeded with in accordance with *any rules of practice 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."

102 Both ss 245 and 247 have been amended since they were first enacted[103]. The courts in which Customs prosecutions may be brought include courts other than the State Supreme Courts and no longer include this Court. No longer are they instituted in the name of the Minister. Section 245 still refers to the institution of a Customs prosecution "by action, information or other appropriate proceeding". Section 247 still refers to the rules of practice established for Crown suits in revenue matters but adds to that reference, the words "if any". The relevant provisions of the *Excise Act* have also been amended but are, in substance, identical in relevant respects to those provisions of the *Customs Act* previously mentioned.

103 The references to instituting proceedings by information and to "rules of practice ... established ... for Crown suits in revenue matters" take on significance when some matters of history are noticed. First, amounts owed to the Crown for customs duty, or as a penalty for not paying customs duty when due, were, at least from the 18th century, and the enactment of 8 Geo I c 18, recoverable by proceedings commenced in the Exchequer by information. The procedure then followed was, to the modern eye, a procedure having at least some similarities

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103 Section 247 now 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 the directions of the Court or a Judge."

with criminal procedure. Upon the information being filed, a writ of capias would issue for the arrest of the debtor to answer the matters charged in the information[104]. Upon arrest, the debtor would stand committed to prison unless admitted to bail. But such proceedings were not, at the time, seen as anything more than "the king's action of debt"[105].

104 Procedures to be followed in pursuing claims of this kind, in England, were much affected by statute. As Dixon CJ pointed out in *Bainbridge-Hawker v The Minister of State for Trade and Customs*[106], consideration of the history of Customs prosecutions must take account of those statutes. Dixon CJ made particular reference to 26 Geo III c 77, 16 & 17 Vict c 107, 39 & 40 Vict c 36 and 42 & 43 Vict c 21 but, for present purposes, it is not necessary to notice the detail of those provisions. What is important is that they were statutory procedures.

105 Developments that occurred in connection with the jurisdiction of the Exchequer, and the rules governing procedures in what s 247 of the *Customs Act* was later to refer to as "Crown suits in revenue matters", are also important. Of those developments, two warrant particular mention. First, by 22 & 23 Vict c 21, practice and procedure on the revenue side of the Court of Exchequer was amended and, under s 26 of that Act, new rules promulgated for the conduct of such proceedings[107]. Those Rules were followed by the further alterations made by the *Crown Suits Act* 1865 (UK) (28 & 29 Vict c 104) and the Rules made under that Act[108]. The second change of importance was the vesting of the jurisdiction of the Court of Exchequer in the King's Bench Division of the High Court of Justice by s 16 of the *Supreme Court of Judicature Act* 1873 (UK) (36 & 37 Vict c 66). Although it is convenient to notice some aspects of the procedures that were followed under those Acts and Rules, the point of chief importance is that, at least by the later part of the 19th century, the procedures for recovery of sums owing to the Crown were regulated by statute and Rules of Court. No doubt it was with that history in mind that those who drafted the *Customs Act* and *Excise Act* contemplated courts making rules of practice for

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104 8 Geo I c 18, s 15. See Manning, *The Practice of the Court of Exchequer*, 2nd ed (1827) at 205-215.

105 *Cawthorne v Campbell* (1790) 1 Anst 205 at 214 [145 ER 846 at 850].

106 (1958) 99 CLR 521 at 547.

107 The Regulae Generales on the Revenue Side of the Court of Exchequer, commonly known as the Exchequer Rules 1860.

108 Rules of Court for Regulating the Procedure and Practice in Suits by English Information, commonly referred to as the English Information Rules.

"Crown suits in revenue matters". But it also follows that 19th century English cases must be understood against the background of the applicable Acts and Rules.

106 Further, although proceedings by English Information were central to revenue practice in England at the end of the 19th century, other procedures were available to the Crown for the enforcement of penalties under Customs legislation. The *Customs Consolidation Act* 1876 (UK) (39 & 40 Vict c 36) had provided, by s 247, that "suits, prosecutions, or informations for recovery of penalties under the Customs Acts" might be commenced either by writ of subpoena or capias as the first process, at the election of the Commissioners of Customs. *The Annual Practice 1912* suggested that proceedings by way of capias were seldom resorted to except in cases of smuggling[109]. But the *Customs Consolidation Act* made plain that if proceedings were instituted by capias, one possible outcome of the proceedings was that the defendant might be convicted and "the person against whom such capias shall issue ... be taken to prison".

107 It is, nonetheless, important to recognise that too much would be made of the use, in 19th century English practice, of language like "information" and processes like capias if the language and processes were taken as necessarily referring to, or invoking the processes of, the criminal law. Rather, proceedings on the revenue side had a unique history and should properly be understood as being proceedings distinctly different, not only from proceedings brought in the name of the Crown for punishment of crime, but also from proceedings for the vindication of rights and duties between subjects. That proceedings on the revenue side were different from what might be called ordinary criminal proceedings and ordinary civil proceedings is not only evident from the adoption of different procedures and methods of trial, it is a difference that was maintained, in England, even after the vesting of the jurisdiction of the Court of Exchequer in the King's Bench Division. For many years after the Judicature Acts, revenue practice in the King's Bench remained governed by the Exchequer Rules and the English Information Rules. No doubt the differences in procedures on the revenue side from the procedures in other kinds of cases, more readily classified as "civil" or "criminal", stemmed from history. But they are differences that reveal the dangers in attempting to force proceedings of this kind into a system of classification in which there are only two classes of proceedings: civil and criminal. To attempt to do that would be to ignore the history of the way in which amounts owing to the Crown, whether for customs duties or for penalties or on other accounts, were treated in England.

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109 Matthews White and Stringer (eds), *The Annual Practice 1912*, vol 2 at 1132.

Recovery of penalties

108 When the *Customs Act* and *Excise Act* were first enacted by the new federal Parliament, no provision was made for the general regulation of claims made by the government against a citizen. In the first year of federation, provision was made for claims *against* the Commonwealth by the *Claims Against the Commonwealth Act* 1902 (Cth). The general regulation of suits *by* the Commonwealth, which now is found in s 64 of the *Judiciary Act* 1903 (Cth), was not enacted until two years later. Thus Pt XIV of the *Customs Act* and Pt XI of the *Excise Act* were enacted in order to provide for the recovery of certain penalties by the newly formed federal polity.

109 The definitions of "Customs prosecutions" and "Excise prosecutions" refer only to the "recovery of penalties" and the condemnation of goods or other items as forfeited. Looked at in isolation from other provisions of the relevant parts of the Acts, the reference to "recovery of penalties" might, in light of the history I have mentioned, be understood as confining the definitions to proceedings in which the only relief sought is an order for the payment of money or the condemnation of goods. That would read the provisions too narrowly. Neither Pt XIV of the *Customs Act* nor Pt XI of the *Excise Act* confined attention to the recovery of money and condemnation of goods or other items. The "penalties" for which each provided evidently extended to the conviction of the defendant.

110 So much is apparent from several provisions of each of the Acts as they stood when first enacted. Section 248 of the *Customs Act* provided that "an appeal shall lie from any conviction ... in the manner provided by the law of the State where such conviction ... is made for appeals from convictions"[110]. Section 252 of the *Customs Act* provided that "[n]o conviction ... shall be held void quashed or set aside" by reason of any defect or want of form[111]. Section 254(2) of the *Customs Act* treated Customs prosecutions as including prosecutions for indictable offences and for offences directly punishable by imprisonment by providing that in every Customs prosecution except for such offences the defendant should be compellable to give evidence[112]. Finally, the provisions of ss 258-261 of the *Customs Act*[113], concerning the committing to gaol of what s 258[114] referred to as "any convicted person" pending that person's

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110 cf *Excise Act*, s 137.

111 cf *Excise Act*, s 141.

112 cf *Excise Act*, s 143(2).

113 cf *Excise Act*, ss 147-150.

114 cf *Excise Act*, s 147.

payment of a pecuniary penalty adjudged payable, were provisions which evidently assumed that a conviction may be recorded in a Customs prosecution.

111 Amendments made to the *Customs Act* and *Excise Act* after they were first enacted do not permit, let alone require, a different conclusion. The definition of Customs prosecutions in s 244 was amended by the *Customs Act* 1952 (Cth) and the *Customs Amendment Act* 1979 (Cth) and, after the events giving rise to the present proceedings, was repealed and substituted by the *Taxation Laws Amendment (Excise Arrangements) Act* 2001 (Cth). The amendments that have been made did not confine the reach of the definition in any relevant respect. The definition of Excise prosecutions in s 133 of the *Excise Act* had not been amended at the time of the events giving rise to the present proceedings. It, too, was later repealed and substituted by the *Taxation Laws Amendment (Excise Arrangements) Act* but again, even if regard were had to that new form of the definition, it did not confine the reach of Excise prosecutions in any relevant respect. Although the provisions for imprisonment of a convicted person pending payment of a pecuniary penalty have been repealed, the references to appeals against conviction[115], and convictions not being held void quashed or set aside by reason of defect or want of form[116], remain in both Acts. The "penalties" which may be "recovered" in a Customs prosecution or an Excise prosecution extend to conviction of the defendant. Orders that convictions be recorded in Customs prosecutions have been made in this Court[117] and in other courts[118]. Customs prosecutions and Excise prosecutions are proceedings which now go, and always have gone, beyond being actions for debt[119].

112 In this respect, the provisions for Customs prosecutions and Excise prosecutions differ markedly from procedures for penalties and forfeitures under United States customs law[120]. The remedies available under those procedures do not include conviction of the defendant but are limited to the recovery of civil penalties (the maximum amount of which varies according to whether the

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115 *Customs Act*, s 248; *Excise Act*, s 137.

116 *Customs Act*, s 252; *Excise Act*, s 141.

117 *L Vogel & Son Pty Ltd v Anderson* (1968) 120 CLR 157.

118 For example, *Chief Executive Officer of Customs v Mak* (2002) 135 A Crim R 562.

119 *Cawthorne v Campbell* (1790) 1 Anst 205 at 214 [145 ER 846 at 850].

120 *Tariff Act of 1930*, 19 USC §1592 (1988).

violation is fraudulent[121], grossly negligent[122] or negligent[123]) and forfeiture of the goods[124]. Proceedings for recovery of such monetary penalties or for forfeiture of goods have been held to be civil causes[125]. Provisions fixing the burden of proof to be met in such proceedings at less than the criminal standard of proof[126], or casting the burden of proof on the person resisting forfeiture[127], have been held not to violate constitutional due process requirements[128]. Even leaving aside the difficulties inherent in attempting to obtain guidance from judicial decisions made in a constitutional framework that is different in so many ways from the Australian framework, because conviction is not available under the procedures considered in those cases, they offer no guidance to resolution of the questions now under consideration.

Standard of proof

113 Against this background it is convenient to deal with the standard of proof required in these proceedings. Much of the argument advanced proceeded from some unstated premises. They should be identified. First, there was the premise, reflected in the questions, that a Customs prosecution and an Excise prosecution can lead to a conviction. The validity of that premise has already been considered. Secondly, much of the argument assumed that the questions about standard of proof could be answered by assigning either the word "civil", or the word "criminal", as an apt description of the "nature" of the proceedings. Thirdly, the argument often assumed that the standard of proof can be determined without considering who bears the onus of proof, or, what effect statutory averment provisions[129] may have on proving the case. Fourthly, the argument

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121 19 USC §1592(c)(1) (1988).

122 19 USC §1592(c)(2) (1988).

123 19 USC §1592(c)(3) (1988).

124 19 USC §1592(c)(5) (1988).

125 *Snyder v United States* 112 US 216 (1884); *Friedenstein v United States* 125 US 224 at 231 (1888).

126 19 USC §1592(e) (1988).

127 19 USC §1615 (1988).

128 *United States v One 1977 36 Foot Cigarette Ocean Racer* 624 F Supp 290 (1985); *United States v One Beechcraft King Air 300 Aircraft* 107 F 3d 829 (1997).

129 *Customs Act*, s 255; *Excise Act*, s 144.

assumed that what was to be proved to the requisite standard of proof could be identified in the present case. These last two assumptions will require further consideration. It is enough to say, for the moment, that all four assumptions illustrate the difficulties that attend the ordering of the separate trial of questions of law divorced from a factual substratum of sufficient particularity[130]. The questions which were asked in the present case were questions of law, not questions of mixed law and fact. Unlike the questions considered in *Bass v Permanent Trustee Co Ltd*[131], they were not hypothetical questions. Nonetheless, the isolation of the questions of law about standard of proof from any reference to the elements or issues to be proved or determined, and from any reference to who bears the onus of establishing relevant propositions, or how that proof could be, or has been, attempted, leads to some difficulty.

The requirements of the Acts

114 Arguments founded on classification of the proceedings as "civil" or "criminal" as determinative of the standard of proof, must fail. As reference to the historical matters mentioned earlier reveals, the classification proposed is, at best, unstable. It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies[132] and trade practices[133] legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing.

115 In any event, this chain of reasoning, from an a priori classification to a conclusion about standard of proof, treats the relevant Acts as providing no more than background information when, in truth, it is with the terms of the Acts that the inquiry must begin. (For the same reason, decisions about the operation of other statutory provisions offer little assistance[134].)

116 Sections 247 of the *Customs Act* and 136 of the *Excise Act* deal with how Customs prosecutions and Excise prosecutions "may be commenced prosecuted

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130 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

131 (1999) 198 CLR 334 at 354-358 [43]-[54].

132 *Corporations Act* 2001 (Cth), Pt 9.4B (ss 1317DA-1317S).

133 *Trade Practices Act* 1974 (Cth), s 77.

134 *First Indian Cavalry Club Ltd v HM Commissioners for Customs and Excise* [1998] SC 126; *Han v Customs and Excise Commissioners* [2001] 1 WLR 2253; [2001] 4 All ER 687.

and proceeded with". Those three aspects of the matter are to be governed by rules of practice, established by the court in which the proceeding is brought, for Crown suits in revenue matters, or "in accordance with the usual practice and procedure of [that] Court in civil cases", or in accordance with the directions of the court or a judge.

Is standard of proof a matter of practice and procedure?

117 The Customs submitted that the standard of proof to be applied was a matter of "practice and procedure" and that the civil standard of proof should, therefore, be applied, that being "in accordance with the usual practice and procedure of the [Supreme Court of Queensland] in civil cases". The Customs submitted that this conclusion found support in history, and in the present state of the authorities in this Court and in intermediate and trial courts.

118 The Customs sought to draw particular support from *Attorney-General v Radloff*[135] and *Attorney-General v Bradlaugh*[136]. It was submitted that the *Customs Act* and *Excise Act* should be understood as having been enacted against a background of the settled understanding, in England, that proceedings like Customs prosecutions and Excise prosecutions were civil in nature. In *Radloff*, the Court of Exchequer Chamber was equally divided about whether proceedings taken under s 82 of 8 & 9 Vict c 87 were properly classed as civil or criminal[137]. In *Bradlaugh*, Brett MR held that s 35 of the *Crown Suits Act* had resolved this difference of opinion, by providing that the revenue side of the Court of Exchequer was to be deemed to be a court of civil judicature[138]. By majority, the Court held that a proceeding to recover a penalty under the *Parliamentary Oaths Act* 1866 (UK) (29 Vict c 19) was not a "criminal cause or matter" for the purposes of the *Supreme Court of Judicature Act*[139].

119 Even if the opinion of Brett MR is taken as settling the question that arose in *Bradlaugh*, it by no means follows that *Bradlaugh* established any rule or principle of the width for which the Customs contended. The question presented by the statute relevant in *Bradlaugh* was whether the description "civil", as distinct from "criminal", should be applied to the particular proceeding. That is,

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135 (1854) 10 Ex 84 [156 ER 366].

136 (1885) 14 QBD 667.

137 (1854) 10 Ex 84 at 97-98 per Martin B, 101-102 per Platt B, 105-106 per Parke B, 108-109 per Pollock CB [156 ER 366 at 371-373, 374-376].

138 *Attorney-General v Bradlaugh* (1885) 14 QBD 667 at 690.

139 *Bradlaugh* (1885) 14 QBD 667 at 678.

the statute *required* classification into one of two possible categories. *Bradlaugh*, therefore, cannot be understood as establishing that such a method of classification is universally valid or as establishing that proceedings for recovery of penalty are necessarily "civil" in nature.

120 The question presented by s 247 of the *Customs Act* and s 136 of the *Excise Act* is different from the question that arose in *Bradlaugh*. It is whether standard of proof is a matter of practice and procedure. What was said in *Bradlaugh* does not bear upon the question in this case.

121 Distinctions between matters of practice and procedure on the one hand, and matters of substantive law on the other, are often made. Like the distinction between "civil" and "criminal" proceedings, the distinction between "substance" and "procedure" is, at best, unstable. Much turns on the purpose for drawing the distinction. Reference to issues of this kind, in a context very different from the present, was made in *John Pfeiffer Pty Ltd v Rogerson*[140]. It is not necessary in this case to explore the outer boundaries of this difficult field.

122 Burden and standard of proof are commonly treated as aspects of the law of evidence. Not only are these subjects dealt with in treatises on evidence[141], it is the *Evidence Act* 1995 (Cth) that provides for the standard of proof to be applied by federal courts in civil[142] and criminal[143] proceedings. These reasons will later seek to demonstrate that rules governing the admissibility of evidence fall within the expression "practice and procedure" when it is used in s 247 of the *Customs Act* and s 136 of the *Excise Act*. If that is so, why should questions of burden and standard of proof not also be regarded as falling within that expression?

123 There are statements in earlier decisions of this Court which may appear to support the view that the burden and standard of proof in a particular kind of case is a matter of practice and procedure. In *Williamson v Ah On*, Higgins J said[144], "the evidence by which an offence may be proved is a matter of mere procedure" and Rich and Starke JJ[145] treated laws regulating the burden of proof

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140 (2000) 203 CLR 503 at 542-544 [97]-[100].

141 For example, *Cross on Evidence*, 6th Aust ed (2000), Ch 4.

142 s 140.

143 s 141.

144 (1926) 39 CLR 95 at 122.

145 (1926) 39 CLR 95 at 127.

as but one species of the genus laws of evidence. Isaacs J[146] adopted the very wide definition of procedure given in Dicey and Keith, *Conflict of Laws*[147] which, as the authors said, they treated as covering the whole field of practice and the whole law of evidence. Similar statements, or approval of what was said in *Williamson*, are to be found in *Milicevic v Campbell*[148], *Sorby v The Commonwealth*[149] and *Nicholas v The Queen*[150].

124 What is said in each of these cases must be understood in its context. None of them decided what is meant by "practice and procedure". *Williamson* and *Milicevic* both concerned the limits of legislative power. *Williamson* and *Milicevic* held that power to legislate with respect to the subject-matters under consideration (immigration and emigration in *Williamson* and trade and commerce in *Milicevic*) extends to enacting "laws prescribing the rules of evidence and procedure to be observed in any legal proceedings, whether criminal or civil, arising in relation to that subject matter and may in particular cast the onus of proof upon either party to those proceedings"[151]. *Sorby* and *Nicholas* concerned the possible intersection between provisions regulating the burden or standard of proof and the requirements of Ch III of the Constitution. *Sorby* and *Nicholas* held that the particular provisions under consideration in each of those cases were not invalid for want of compliance with the requirements of Ch III of the Constitution. In each of these cases, "practice and procedure" or other similar expressions appear to have been used in a very general way: as expressions convenient for describing the methods that are employed for the resolution of controversies by the application of the judicial power of the Commonwealth. Nothing said in those cases governs the question of construction that now arises.

125 The references in the *Customs Act* and *Excise Act* to practice and procedure in civil cases must be construed in the context which those Acts provide. Most notably, the references must be understood in a context in which there are two related features. First, the relevant subjects, which are to be regulated by the provision, are commencing prosecuting and proceeding with prosecutions. Secondly, in addition to referring to practice and procedure in civil

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146 (1926) 39 CLR 95 at 109.

147 3rd ed (1922) at 761-763.

148 (1975) 132 CLR 307 at 316-317 per Gibbs J, 318-319 per Mason J.

149 (1983) 152 CLR 281 at 298 per Gibbs CJ.

150 (1998) 193 CLR 173 at 189-190 [24] per Brennan CJ.

151 *Milicevic v Campbell* (1975) 132 CLR 307 at 316 per Gibbs J.

cases, there is reference to the three subjects I have identified being regulated by rules of practice established by a court or by directions given by the court or a judge. The standard of proof to be attained in Customs prosecutions or Excise prosecutions is not to be fixed by court-established rules of practice about commencing prosecuting or proceeding with the prosecution. Nor is it to be fixed by directions given on those subjects by a court or a judge. Standard of proof is not to be fixed by either of those methods because it does not fall within the identified subject-matters: commencing prosecuting or proceeding with the prosecution.

126 Absent specific statutory authority it is not to be supposed that the standard of proof to be attained in a particular matter may be fixed by rules of court, or determined by direction of the court or a judge in a particular case. To hold that the standard of proof could be fixed by rules of court, or determined by judicial direction, would entail that the standard of proof to be attained in a proceeding taken under federal legislation might vary according to the court in which the proceeding is brought or might be different in different cases brought in the one court. The provisions of s 247 of the *Customs Act* and s 136 of the *Excise Act* are not to be construed as permitting such results. Neither section offers any guidance for what matters should inform a decision about such a fundamental matter as burden or standard of proof. No matter what relief might be sought in a particular Customs prosecution or Excise prosecution it would be odd indeed if the availability of that relief depended upon the giving of a direction in the particular case about which party bore the onus of proving particular issues, or upon the giving of a direction about the standard of satisfaction to be attained. When the relief in question is, or includes, conviction of the defendant, the results described could be held to follow only from the use of clear and unequivocal statutory language, in particular language requiring the conclusion that it would be open to the judge to decide in each case what standard of proof should be met. Neither of the provisions now under consideration require that conclusion. All this being so, it would be wrong to read the third source which the Acts give for the regulation of the commencement prosecution and proceeding with a prosecution (namely the rules of practice and procedure in civil cases) as dealing with the subject of standard of proof when the other two sources do not. If it is not within the power of a judge hearing a Customs prosecution or Excise prosecution to give a direction fixing the standard of proof to be attained in a particular proceeding, and if it is not within the rule-making competence of the judges of a court to make rules having that effect, the expression "the usual practice and procedure ... in civil cases" should not be construed as extending so far.

127 Contrary to the Customs' submission, this Court's decision in *Naismith v McGovern*[152] does not require a different conclusion. The particular question at

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152 (1953) 90 CLR 336.

issue in *Naismith* was whether, in a Taxation prosecution, a defendant was entitled to an order for discovery of documents against the Commissioner of Taxation. Part VII of the *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth) made provision for Taxation prosecutions in terms substantially the same as those governing Customs prosecutions and Excise prosecutions. The Court held[153] that, the Act providing that the procedure for obtaining an order for recovery of penalty should be governed by the civil procedure of the Court, an order for discovery should be made.

128 In its reasons in *Naismith*, the Court referred to a number of cases in which statements were made about the nature of proceedings such as the present[154]. Of those, it is only in the two decisions of Fullagar J, as a Judge of the Supreme Court of Victoria, that any general description of the proceedings as being civil rather than criminal in their nature[155] is given, and in neither of those cases was it necessary to decide a point described in such general terms. In the other decisions mentioned in *Naismith*, including, in particular, *Mallan v Lee*, nothing decisive of the questions now under consideration is said.

129 Some decisions of trial and intermediate courts, after *Naismith*, may certainly be understood as suggesting that the standard of proof to be applied in proceedings of the present kind is the civil standard, not the criminal standard. It may be doubted, however, that a single dominant view has emerged. In *Evans v Lynch*[156], the proceedings were said to be "by statute, civil proceedings". In *Button v Evans*, Carruthers J held[157] that the applicable standard of proof was the civil standard. On appeal to the Court of Appeal of New South Wales, it was said[158] that Carruthers J had also recorded that the evidence would have satisfied him on the relevant matters beyond reasonable doubt. The Court of Appeal said, of s 247[159], that its purpose was to assimilate Customs prosecutions to

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153 (1953) 90 CLR 336 at 341.

154 *R v McStay* (1945) 7 ATD 527 at 533; *McGovern v Hillman Tobacco Pty Ltd* (1949) 4 AITR 272; *Mallan v Lee* (1949) 80 CLR 198 at 209, 217-218; *Jackson v Butterworth* [1946] VLR 330; *Jackson v Gromann* [1948] VLR 408 at 411; *Attorney-General v Freer* (1822) 11 Price 183 at 197 [147 ER 441 at 446].

155 *Jackson v Butterworth* [1946] VLR 330 at 332; *Jackson v Gromann* [1948] VLR 408.

156 [1984] 3 NSWLR 567 at 570.

157 [1984] 2 NSWLR 338 at 353.

158 *Evans v Button* (1988) 13 NSWLR 57 at 73.

159 (1988) 13 NSWLR 57 at 74.

proceedings of a civil nature. It was not argued, on appeal to the Court of Appeal[160], that the trial judge had erred in approaching the standard of proof as he had.

130 Those decisions may be contrasted with *Moore v Jack Brabham Holdings Pty Ltd*[161] and *Comptroller-General of Customs v D'Aquino Bros Pty Ltd*[162]. In the former, Hunt J said[163] that "the true nature" of a Customs prosecution was criminal, not civil, despite the civil nature of the procedure made applicable to them. In the latter, his Honour, then Chief Judge at Common Law, concluded[164] that a Customs prosecution might not be brought to recover fines, as distinct from penalties, and said[165] that he adhered to the conclusion he had reached in *Jack Brabham Holdings* that a Customs prosecution was a proceeding in relation to a criminal offence.

131 As is apparent from what I have already said, I do not consider it useful or relevant to attempt any classification of proceedings of the present kind as civil or criminal and then argue from that classification to a conclusion about standard of proof. It is, therefore, neither necessary nor appropriate to engage in any examination of the reasoning which underpins this aspect of the decisions in *Jack Brabham Holdings* or *D'Aquino Bros*. Nor is it necessary or appropriate for me to examine the particular issues that were agitated in those cases about the applicability of proceedings for dismissal for want of prosecution[166] or the availability of the Customs prosecution procedure when what is sought to be recovered is a fine[167]. Rather, the questions asked about standard of proof require consideration, in the first instance, of what (if anything) the *Customs Act* and *Excise Act* provide in that particular respect. They do not require a general classification of the proceedings as a whole. For the reasons given earlier, neither s 247 of the *Customs Act* nor s 136 of the *Excise Act* provides for what

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160 (1988) 13 NSWLR 57 at 73.

161 (1986) 7 NSWLR 470.

162 (1996) 135 ALR 649.

163 (1986) 7 NSWLR 470 at 482.

164 (1996) 135 ALR 649 at 656.

165 (1996) 135 ALR 649 at 661.

166 *Moore v Jack Brabham Holdings Pty Ltd* (1986) 7 NSWLR 470 at 483.

167 *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1996) 135 ALR 649 at 656.

standard of proof is to be applied. No other provision of those Acts was said to do so.

The *Judiciary Act* – State laws and the common law

132 The *Customs Act* and *Excise Act* not providing for what standard of proof is to be applied in proceedings of the present kind, it is necessary to consider the operation of ss 79 and 80 of the *Judiciary Act*. When hearing the proceedings, the Supreme Court of Queensland exercises federal jurisdiction. Section 79 of the *Judiciary Act* picks up and applies State laws, including the laws relating to procedure evidence and the competency of witnesses. No State law was said to prescribe the standard of proof to be applied in cases of the present kind. Section 80 therefore operates, "[s]o far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect", to pick up and apply the common law as modified by the Constitution and State statute law.

133 As Gummow J points out, at the times relevant to the present matter, s 4(1) of the *Crimes Act* 1914 (Cth) provided that, subject to that Act and any other Act, "the principles of the common law with respect to criminal liability apply in relation to offences against laws of the Commonwealth". That provision had effect despite s 80 of the *Judiciary Act*. Again, as Gummow J points out, there is undoubtedly an intimate connection, in the criminal law, between questions of burden of proof and the substantive law, a connection which is maintained by the provisions of the *Criminal Code Act* 1995 (Cth).

134 Although burden of proof is closely connected with substantive rules prescribing criminal liability, I tend to prefer the view that "the principles of the common law with respect to criminal liability" to which s 4(1) of the *Crimes Act* referred did not include common law principles about burden and standard of proof. It is, however, not necessary to decide whether that is right because whether by s 80 of the *Judiciary Act*, or by s 4(1) of the *Crimes Act*, attention was directed in this case to the common law. (The *Customs Act* was later amended to apply some, but exclude some other, provisions of the *Criminal Code*. The *Criminal Code's* provisions about standard of proof are excluded. These amendments to the *Customs Act* neither permit nor require some different conclusion. As s 5AA(4) of the *Customs Act* now provides, the application of some provisions of the *Criminal Code* is not to be interpreted as affecting the standard or burden of proof for an offence under the *Customs Act* that is the subject of a Customs prosecution.)

135 What does the common law require? Where what is sought is conviction of the defendant for an offence against a law of the Commonwealth, it must be strongly arguable that nothing short of proof beyond reasonable doubt will do. If no conviction is sought, but other relief is (as, for example, a declaration that the defendant contravened identified provisions of the relevant Act coupled with

orders for payment of monetary penalties), it must be strongly arguable that, in proceedings conducted according to civil procedures, proof to the civil standard will suffice. No doubt, in accordance with well-established principle[168], if the civil standard were to be applied, "the nature of the issue [would] necessarily [affect] the process by which reasonable satisfaction is attained" and "exactness of proof [would be] expected"[169].

136 Those tentative conclusions do not depend upon attributing a description of "civil" or "criminal" to the proceedings as a whole or seeking to identify some "essential character" of the proceedings. (By what process of distillation the "essential character" of proceedings could be revealed is not apparent.) Rather, the conclusions proposed focus upon, and attach significance to, the kinds of orders which the proceedings seek. In particular, proceedings are distinguished according to whether or not they seek the conviction of the defendant for an offence.

137 As Dawson and McHugh JJ said in *Maxwell v The Queen*[170], "[t]he question of what amounts to a conviction admits of no single, comprehensive answer". The word has long been recognised as being used in various ways[171]. In particular, there may well be a question whether conviction depends upon verdict or plea, or upon the sentence of the court[172]. What is clear, however, is that where the *Customs Act* and *Excise Act* speak of "conviction" they speak of an adjudication by the court that the defendant has contravened a provision of the Act. The adjudication sought is in no relevant way different from the adjudication that occurs when a person accused of crime pleads guilty to, or is found guilty of, that crime, and the court accepts or determines[173] that the accused is criminally responsible for that offence.

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168 *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Helton v Allen* (1940) 63 CLR 691; *Hocking v Bell* (1945) 71 CLR 430; *Rejfek v McElroy* (1965) 112 CLR 517; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; 110 ALR 449.

169 *Briginshaw* (1938) 60 CLR 336 at 363.

170 (1996) 184 CLR 501 at 507.

171 *Cobiac v Liddy* (1969) 119 CLR 257 at 271 per Windeyer J; *Burgess v Boetefeur* (1844) 7 Man & G 481 at 504 per Tindal CJ [135 ER 193 at 202].

172 *Cobiac* (1969) 119 CLR 257 at 271 per Windeyer J; *Maxwell v The Queen* (1996) 184 CLR 501 at 507 per Dawson and McHugh JJ, 519-521 per Toohey J, 529-531 per Gaudron and Gummow JJ.

173 *Maxwell* (1996) 184 CLR 501 at 509 per Dawson and McHugh JJ, 520 per Toohey J, 531 per Gaudron and Gummow JJ.

138 Seeking to obtain the conviction of a person accused of contravening written or unwritten law lies at the heart of the criminal process. The fact of conviction is an important criterion for the operation of constitutional provisions[174] and the operation of federal[175] and State[176] legislation. Absent statutory provision to the contrary, a conviction should not be recorded except where the requisite elements of the contravening conduct are established beyond reasonable doubt.

Penal consequences

139 Other criteria which might be used to distinguish between cases in which proof beyond reasonable doubt is necessary, and those in which it is not, are unhelpful. Apart from attempting to classify proceedings as "civil" or "criminal", the only other possible criterion advanced for consideration focused upon the penal consequences of Customs and Excise prosecutions. But penal consequences (in the form of punitive damages) can follow from proceedings which, in all other respects, would ordinarily be referred to as civil proceedings[177] and it has not hitherto been suggested that proof beyond reasonable doubt is necessary before that kind of relief is ordered. Further, both federal and State companies legislation[178] has provided for recovery of what are described as "civil penalties" on proof of the requisite matter to the civil standard of proof[179] but the operation of those provisions did not, and does not, extend to proceedings for an offence. Characterising particular forms of relief sought in proceedings as "penal" offers little or no assistance in deciding what standard of proof should be applied.

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174 s 44(ii).

175 For example, legislation governing the holding of certain statutory offices such as offices under the *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth), s 31(2).

176 For example, legislation governing the sentencing of offenders such as the *Sentencing Act* 1991 (Vic), s 8.

177 *Gray v Motor Accident Commission* (1998) 196 CLR 1.

178 *Corporations Act*, Pt 9.4B (ss 1317DA-1317S); Corporations Law of New South Wales (and other equivalent State Corporations Laws), Pt 9.4B (ss 1317E-1317S).

179 *Corporations Act*, s 1332; Corporations Law of New South Wales, s 1332.

The significance of the averment provisions

140 In Customs and Excise prosecutions the Customs bears the onus of proving the elements of its case. It is, nonetheless, important to notice the way in which that proof may be effected.

141 Both the *Customs Act* and the *Excise Act* provide that 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"[180]. This provision applies to any matter so averred even if evidence in support, *or rebuttal*, of the matter averred is given by witnesses[181]. Any evidence given by witnesses in support or rebuttal must be considered on its merits and "the credibility and probative value of such evidence shall be neither increased nor diminished" by reason of the section[182].

142 Although the averment provisions of the Acts do not apply to an averment of the intent of the defendant, or to proceedings for an indictable offence or an offence "directly punishable by imprisonment"[183], they are provisions which can be engaged in many proceedings in which conviction for an offence against the *Customs Act* or *Excise Act* is one of the orders sought. Indeed, in the present matter, the whole of the Customs' amended statement of claim was set out beneath the introductory words that pursuant to s 255 of the *Customs Act* and s 144 of the *Excise Act* "the plaintiff says and avers and it is the fact that". (Whether reliance on the averment provisions in this way is open to the Customs in this case is a question which was not argued and about which I express no view.) For present purposes, what is important is that although the averment provisions do not place upon the defendant the burden of disproving facts[184], averments of the Customs will suffice to discharge its onus of proving those facts. It will, in every case, be a matter for the judge to say, on the whole of the material, whether the facts are established to the requisite degree of proof. The judge may, but need not, treat what is properly averred as establishing that degree of proof.

143 Is requiring proof beyond reasonable doubt consistent with these averment provisions? If evidence is given in rebuttal of a fact averred, and that fact is an

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180 *Customs Act*, s 255(1); *Excise Act*, s 144(1).

181 *Customs Act*, s 255(2)(a); *Excise Act*, s 144(2)(a).

182 *Customs Act*, s 255(3); *Excise Act*, s 144(3).

183 *Customs Act*, s 255(4); *Excise Act*, s 144(4).

184 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507.

element of a contravention in respect of which conviction is sought, how is the judge to approach the task of deciding whether the Customs has proved that fact beyond reasonable doubt? How can the judge, in those circumstances, "feel an actual persuasion"[185] of the occurrence or existence of that fact?

144 That problem is real but it is not avoided if a civil standard of proof is applied. If that were to be held to be the applicable standard of proof, it would follow from *Briginshaw v Briginshaw*, and like cases in that line of authority, that proof of an issue to the "reasonable satisfaction" of the tribunal of fact "should not be produced by inexact proofs, indefinite testimony, or indirect inferences"[186] and that the tribunal must feel that "actual persuasion" of which Dixon J spoke in *Briginshaw*[187]. No matter what standard of proof is adopted, the averment provisions may, in certain circumstances, confront a judge with the difficulty of resolving a competition between the requirement of the averment provisions that, as a matter of law, certain facts may, but need not, be taken to have been established to the requisite standard, and evidence tendered in contradiction of that conclusion. No matter what the standard of proof, the judge can resolve that competition in favour of the party making the averment only if persuaded of the existence or occurrence of the fact averred. The averment provisions, therefore, neither suggest nor require departure from the tentative answer expressed earlier in these reasons that if conviction is sought, proof beyond reasonable doubt of the elements of the relevant offence is necessary.

145 The questions about standard of proof should be answered accordingly. Lest there be some misunderstanding about the effect of the answers that are given, it is as well to make explicit that what must be proved beyond reasonable doubt is the elements of the relevant offence. That should not be understood as denying the application of established principles about such matters as proof by circumstantial evidence[188] or as suggesting that every matter alleged in a particular form of pleading must be established to that standard. It is the elements of the offences that must be established.

The *Evidence Act*

146 The third and fourth questions asked whether these Customs prosecutions and Excise prosecutions are "criminal proceedings for the purposes of the Queensland *Evidence Act*". The questions proceed from the premise that it is

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185 *Briginshaw* (1938) 60 CLR 336 at 361.

186 *Briginshaw* (1938) 60 CLR 336 at 362.

187 (1938) 60 CLR 336 at 361.

188 *Shepherd v The Queen* (1990) 170 CLR 573.

relevant to ask how the Queensland statute would classify the proceedings. That premise is wrong. The relevant questions are whether, by s 247 of the *Customs Act* and s 136 of the *Excise Act*, those provisions of the *Evidence Act* which operate in criminal proceedings are to be applied in these proceedings.

147 For the reasons given earlier in connection with the questions about standard of proof, s 247 of the *Customs Act* and s 136 of the *Excise Act* require the Supreme Court of Queensland to apply its usual practice and procedure in civil cases in proceedings with the present matters. Those provisions of the *Evidence Act* which regulate the admissibility of evidence as to facts in issue are provisions regulating the practice and procedure of the courts of Queensland. That being so, those provisions of the *Evidence Act* that would be applied in a civil case are to be applied in the present proceedings. In particular, the admissibility of documentary evidence as to facts in issue is to be regulated by s 92 of that Act, not s 93. It is not to the point to ask how a classification of proceedings which is adopted in the Queensland statute (as a "criminal proceeding"[189] or as a "proceeding (not being a criminal proceeding)"[190]) might be applied to proceedings of the present kind.

148 The questions about the *Evidence Act* should, therefore, each be answered: "Those provisions of the *Evidence Act* 1977 (Q) which would be applied by the Supreme Court of Queensland in civil cases (including, in particular, the provisions of s 92 of that Act) are to be applied in the trial of the present proceedings."

Orders

149 The appeal to this Court should be allowed to the extent necessary to permit the substitution of the answers I propose for the answers which the Court of Appeal ordered to be given. Each party having had a measure of success on the appeal to this Court there should be no order for the costs of the appeal to this Court. In accordance with the terms on which special leave to appeal was granted, the orders for costs made in the courts below should not be disturbed.

150 Accordingly, I would order:

1. Appeal allowed in part.

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189 *Evidence Act* 1977 (Q), s 3.

190 *Evidence Act*, s 92(1).

2. Set aside pars 2 and 3 of the orders of the Court of Appeal of Queensland made on 20 July 2001 and, in lieu thereof, vary the order of Atkinson J made on 9 June 2000 by substituting the following:

   (a) In order to obtain a conviction of a defendant for any of the offences specified, the elements of the offence must be established beyond reasonable doubt.

   (b) In order to obtain a conviction of a defendant for any of the offences specified, the elements of the offence must be established beyond reasonable doubt.

   (c) Those provisions of the *Evidence Act* 1977 (Q) which would be applied by the Supreme Court of Queensland in civil cases (including, in particular, the provisions of s 92 of that Act) are to be applied in the trial of the present proceedings.

   (d) Those provisions of the *Evidence Act* 1977 (Q) which would be applied by the Supreme Court of Queensland in civil cases (including, in particular, the provisions of s 92 of that Act) are to be applied in the trial of the present proceedings.

3. There is no order as to the costs of the appeal in this Court.