HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND HEYDON JJ

CHIEF EXECUTIVE OFFICER OF CUSTOMS APPELLANT

AND

NAZIH EL HAJJE RESPONDENT

Chief Executive Officer of Customs v El Hajje
[2005] HCA 35
3 August 2005
M171/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 17 December 2003 and remit the matter to that Court for its further hearing and determination.*

On appeal from the Supreme Court of Victoria

Representation:

C M Maxwell QC with P D Nicholas for the appellant (instructed by the Australian Government Solicitor)

D B Baker with G J Herbert for the respondent (instructed by Michael J Gleeson & Associates Pty Ltd)

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 El Hajje

Customs and excise – Averment provision – Whether ultimate fact in issue in an excise prosecution is not properly the subject-matter of an averment provision – Whether *Excise Act* 1901 (Cth), s 144(1) draws a distinction between an ultimate fact in issue and other facts – Whether primary judge erred in finding that the material in the respondent's possession, custody or control was manufactured or partly manufactured goods.

Constitutional law (Cth) – Whether the High Court should consider constitutional issues if not necessary to decide a case – Effect of absence of notice under *Judiciary Act* 1903 (Cth), s 78A.

Constitutional law (Cth) – Averment provisions – Compatibility of statutory averment provisions with the judicial power and functions provided for by Ch III of the Constitution.

Constitutional law (Cth) – Interpretation of Commonwealth statutes – Relevance of Constitution where not raised by parties – Whether High Court practice requires that constitutional questions not be considered in such cases – Whether any such consideration involves procedural unfairness to law officers entitled to notice of constitutional issues – Whether Constitution a necessary contextual consideration in interpretation of Commonwealth statutes.

Interpretation – Statutes – Federal legislation – Relevance of the Constitution (Cth) – Whether necessary contextual consideration influencing or affecting meaning of law – Whether failure of parties to raise issue obliges Court to ignore constitutional considerations – Whether procedural fairness, including failure of parties to give notice to law officers of constitutional questions, obliges Court to ignore any constitutional considerations not raised by parties.

Words and phrases – "averment", "excise duty", "ultimate fact in issue".

Constitution, Ch III.
Excise Act 1901 (Cth), ss 117, 144.
Judiciary Act 1903 (Cth), s 78A.
Excise Tariff Act 1921 (Cth).
Excise Tariff Amendment Act (No 1) 2000 (Cth).

1 McHUGH, GUMMOW, HAYNE AND HEYDON JJ. Since first enacted in 1901 the *Excise Act* 1901 (Cth) ("the Act") has contained averment provisions, the evident intention of which has been to facilitate proving Excise prosecutions. Since 1918 the Act has provided[1] that:

> "In any Excise prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter or matters averred."

2 The appellant, Chief Executive Officer of Customs ("Customs"), brought an Excise prosecution against the respondent in the Supreme Court of Victoria alleging contravention of s 117 of the Act – a provision dealing with the unlawful possession of excisable goods upon which Excise duty had not been paid. Customs' Amended Statement of Claim contained some averments.

3 At first instance[2], the respondent was convicted and fined. He appealed to the Court of Appeal of Victoria. That Court held[3] that the ultimate fact in issue in an Excise prosecution is not properly the subject-matter of an averment. In this case the ultimate fact in issue was understood as being whether tobacco in the respondent's possession, custody or control (described as "cut tobacco") was manufactured, or partly manufactured goods. The appeal was allowed and the conviction and fine set aside.

4 Customs now appeals to this Court. The appeal should be allowed. The averment provisions of the Act do not draw a distinction between the ultimate fact or facts in issue and other facts.

The facts

5 In the early hours of 21 February 2000 the respondent was driving a rented truck in Broadford, Victoria, when intercepted by police. Customs was later to allege that the truck was carrying (among other things) "a quantity of cut tobacco weighing 691.48 kilograms" wrapped in 72 plastic bags each containing "a number of smaller plastic bags, each of which contained approximately 500 grams of cut tobacco". Customs also alleged that the truck was carrying 15 bales of leaf tobacco, but that allegation may be put to one side for present purposes.

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1 s 144(1).

2 *CEO of Customs v El Hajje* [2002] VSC 286.

3 *El Hajje v Chief Executive Officer of Customs* (2003) 180 FLR 224 at 230 [21].

Section 117 of the Excise Act

6 In February 2000, s 117 of the Act provided[4] that no person other than a manufacturer shall, except by authority, have in that person's possession, custody or control, any manufactured or partly manufactured excisable goods upon which Excise duty has not been paid. Contravention of that provision constituted an offence punishable upon conviction as provided by s 129 of the Act.

7 The proceeding which gives rise to the present appeal was instituted against the respondent in the Supreme Court of Victoria on 30 August 2000. Subsequently, a number of amendments were made[5] to those provisions of the Act regulating the production and manufacture of tobacco, and to the provisions of s 117 regulating the unlawful possession of excisable goods. In addition, s 129 of the Act was repealed[6] and a new Pt XA introduced[7] to create a system of infringement notices for offences under s 117(2) (the unlawful possession of excisable goods) and s 117B(2) (unlawfully selling excisable goods). The appeal to this Court was conducted on the basis that those amendments do not bear upon the particular issue at the centre of this appeal, namely, the reach of the averment provisions of s 144 of the Act.

The *Excise Tariff Act*

8 Neither the reasons of the primary judge nor the reasons of the Court of Appeal describe the statutory steps that lie behind saying that the ultimate fact in issue was whether the tobacco in the respondent's possession was manufactured or partly manufactured goods or was properly referred to as "cut tobacco". It is necessary to trace those steps and when that is done, it emerges that references to "cut tobacco" found in the reasons of the courts below (and no doubt adopted from the pleadings and argument in the case) are references that obscure some aspects of the relevant legislative provisions.

9 Section 5(1) of the *Excise Tariff Act* 1921 (Cth) ("the Tariff Act") imposed the duties of excise specified in the Schedule to that Act. Section 5(2) of the

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4 s 117(1).

5 By the *Excise Amendment (Compliance Improvement) Act* 2000 (Cth), which commenced operation on 7 September 2000.

6 *Excise Amendment (Compliance Improvement) Act*, Sched 1, item 58.

7 *Excise Amendment (Compliance Improvement) Act*, Sched 1, item 59.

Tariff Act provided that, where a section of another Act, passed before or after the commencement of that sub-section, amended the Schedule to the Tariff Act, unless the contrary intention appeared, that section imposed duties of excise in accordance with the Schedule as so amended on all goods dutiable under the Schedule as amended and in force on that day.

10 Section 6 of the Act (the *Excise Act* 1901) provided that that Act is incorporated and should be read as one with (among other things) any instruments made under the Act and with any other Act relating to excise in force in the Commonwealth.

11 By the *Excise Tariff Amendment Act (No 1)* 2000 (Cth) ("the 2000 Tariff Amendment"), the relevant provisions of which had effect on and from 1 November 1999[8], a definition of "tobacco" was inserted in the Schedule to the Tariff Act. "[T]obacco" was defined[9] as "tobacco leaf subjected to any process other than curing the leaf as stripped from the plant". In addition, the Schedule to the Tariff Act was amended to describe the relevant excisable goods in item 6 of the Schedule ("the Articles") as:

> "Tobacco (other than tobacco delivered under item 9A of the Schedule)
>
> (A) in stick form not exceeding in weight 0.8 grams per stick actual tobacco content
>
> (B) other".

(Item 9A referred to tobacco, cigars, cigarettes and snuff for use in certain medical or other scientific research programmes.)

12 The 2000 Tariff Amendment also repealed the former item 8 of the Schedule to the Tariff Act (which had referred to cigarettes "and fine cut tobacco") and substituted a new form of item 8 making no reference to "cut" or "fine cut" tobacco. Following the amendments made to the Schedule to the Tariff Act by the 2000 Tariff Amendment there was, therefore, no reference in the Schedule to "cut tobacco". Rather, the central feature of the definition of the relevant excisable good was that tobacco leaf had been subjected to *any* process other than curing the leaf as stripped.

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8 *Excise Tariff Amendment Act (No 1)* 2000 (Cth), s 2(2).

9 Schedule to the *Excise Tariff Act* 1921 (Cth) as amended by item 1 of Sched 1 to the 2000 Tariff Amendment.

13 In February 2000, by notice published in the *Gazette*[10] in accordance with the Tariff Act's provisions[11] about the indexation of rates of duty, the rate of excise duty for goods classified to item 6B of the Schedule to the Tariff Act was fixed at $239.44 per kilogram.

The proceeding below

14 In the proceeding in the Supreme Court of Victoria, Customs claimed (a) declarations that the respondent had committed offences against the Act, (b) the conviction of the respondent for those offences, (c) orders imposing penalties on the respondent and requiring him to pay the amounts of Excise duty allegedly evaded, and (d) a declaration that the tobacco it was alleged that he had had in his possession, custody or control was or had been forfeited to the Crown. The proceeding was commenced by writ of summons and a statement of claim was endorsed on the writ. An Amended Statement of Claim was later filed.

15 The Amended Statement of Claim concluded by stating that "[t]o the extent permitted by law the Plaintiff avers the matters set out in paragraphs 2 to 8, inclusive, paragraphs 11 and 12 and paragraphs 14 to 19, inclusive". It is, therefore, necessary to set out those parts of the Amended Statement of Claim that were thus averred, omitting some particulars that were given in this pleading about the tobacco. Paragraphs 2 to 8 provided:

> "2. At all material times the Defendant neither held nor had he been issued with:
>
> (a) a licence to manufacture excisable goods or products, such as cut tobacco (known as an Excise Manufacturer's Licence); or
>
> (b) a licence to store excisable goods or products (known as a Warehouse Licence)
>
> under the *Excise Act 1901*.
>
> 3. At no time was an entry ever lodged with Customs by the Defendant or under his name on which excise duty had been paid

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10 *Commonwealth of Australia Gazette*, S49, 3 February 2000.

11 s 6A.

for goods entered for home consumption under Item 6B of the Schedule to the *Excise Tariff Act 1921*.

The cut tobacco

4. On 21 February 2000 in Sugarloaf Creek Road, Broadford in the State of Victoria, near its intersection with Glenaroua Road, the Defendant had in his possession, custody or control manufactured or partly manufactured excisable goods, namely a quantity of cut tobacco weighing 691.48 kilograms ('the cut tobacco').

...

5. The cut tobacco is and was at all material times goods manufactured or partly manufactured by a person not licensed as a manufacturer of tobacco products under the *Excise Act 1901*.

6. No excise duty had been paid on the cut tobacco by the Defendant or by anyone else.

7. At no time did the Defendant have any permission or authority to have the cut tobacco in his possession, custody or control.

8. On and at all material times prior to 21 February 2000 the Defendant was aware and knew that excise duty was payable on:

(a) cut tobacco; and

(b) tobacco of the kind referred to in paragraph 4."

16 Paragraphs 9 and 10 did not contain matter that was averred. Paragraph 10 alleged that on 21 February 2000 the duty of excise applicable to cut tobacco of the kind referred to in par 4 of the pleading was payable under the description "Tobacco – Other" at the rate of $239.44 per kilogram as specified in item 6B of the Schedule to the Tariff Act. Paragraph 11, the matters in which were averred, pleaded that the amount of excise duty payable on the cut tobacco was $165,567.97.

17 Paragraphs 12 and 13 of the Amended Statement of Claim concern some baled leaf tobacco allegedly found in the truck being driven by the respondent.

The primary judge found that the contravention in respect of this tobacco was not made out[12]. These allegations may therefore be put aside from consideration.

18 Customs further averred the matters set out in pars 14 to 19 of the Amended Statement of Claim. Those paragraphs read as follows:

> "14. At no time did the Defendant have any permission or authority to have proclaimed material in his possession, custody or control, or to store or keep proclaimed material.
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> 15. On and at all material times prior to 21 February 2000 the Defendant was aware and knew that he had no permission or authority to store or keep:
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> (a) proclaimed material; and
>
> (b) tobacco of the kind referred to in paragraph 12.
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> 16. Neither the Defendant nor any other person has paid or tendered the duty of excise on the cut tobacco in the sum of $165,567.97 or any part thereof, or in any other sum.
>
> 17. The conduct referred to in paragraphs 2-8, 12 and 14-16, inclusive was engaged in by the Defendant with intent to:
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> (a) evade the payment of excise duty which was payable on the cut tobacco; and
>
> (b) defraud the revenue.
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> 18. The Defendant intentionally evaded excise duty in the sum of $165,567.97 in respect of the cut tobacco.
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> 19. In the premises:
>
> (a) on 21 February 2000 at Broadford in the said State the Defendant did contrary to subsection 117(1) of the *Excise Act 1901* have in his possession, custody or control manufactured or partly manufactured excisable goods, namely a quantity of cut tobacco, upon which excise duty had not been paid; and

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12 [2002] VSC 286 at [10].

(b) on 21 February 2000 at Broadford in the said State the Defendant did contrary to subsection 117(1) of the *Excise Act 1901* keep or store proclaimed material, namely a quantity of leaf tobacco."

(Again, the allegation in par 19(b) concerned the baled leaf tobacco and may be ignored.)

The trial

19 The respondent appeared in person at the trial of the proceeding. Oral evidence was given. Customs called those members of the police force who had intercepted the truck being driven by the respondent and those officers described the tobacco found in the truck. Investigators employed by the Australian Taxation Office and the Australian Customs Office gave evidence of an interview conducted with the respondent, of the weight of the cut tobacco, and of the calculation of duty payable in respect of the tobacco. An employee of the truck hire company gave evidence of the hire of the truck.

20 The respondent gave evidence in his defence. He gave an account of the circumstances which led to his driving the truck. He said that he knew that he was not allowed to carry tobacco and that the man who had loaded the truck with tobacco did not have a licence. The primary judge, however, said of the respondent's evidence that there were many aspects which caused his Honour "to suspect that it is a less than candid and accurate account"[13]. What, if any, consequences follow from that fact is not immediately relevant to the issues that must be determined in this appeal.

21 The primary judge said in his reasons[14] that the basic facts in the matter were not in dispute. He then identified three matters. First, the primary judge said that the respondent was intercepted in Broadford en route to Sydney in a hired truck containing about 1,500 kilograms of tobacco and four tyres and some wheel rims. Secondly, he said that the cut tobacco portion of the goods was manufactured excisable goods upon which duty had not been paid. Thirdly, he said that the duty payable on the cut tobacco was $165,567.97. Whether the primary judge was right to describe these as matters not in dispute was not relevant to and was not explored in argument in this Court. We therefore express

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13 [2002] VSC 286 at [9].

14 [2002] VSC 286 at [5].

no view about whether the second of these matters (that the cut tobacco was manufactured excisable goods upon which duty had not been paid) may permit or require some examination in the further hearing of this matter on remitter.

The Court of Appeal

22 The respondent appealed against the orders made by the primary judge other than the order declaring the cut tobacco forfeit. Four grounds of appeal were stated: two alleged that the primary judge should not have found that cut tobacco is manufactured goods; the third ground alleged that s 129 of the Act was not "relevant to the conduct" of the respondent, and the fourth alleged that the respondent had not been afforded a fair hearing at the trial. The last of these grounds was rejected by the Court of Appeal. What was meant by the third ground (that s 129 was not relevant to the respondent's conduct) was not explored in that Court's reasons. The first two grounds were regarded as determinative.

23 The reasoning that led the Court of Appeal to its conclusion, that an ultimate fact in issue cannot be averred, proceeded[15] from the proposition that tobacco leaf might be cut for purposes which have nothing to do with manufacture into a product suitable for consumption. The averment of the matters alleged in par 4 of the Amended Statement of Claim, that the goods in the possession, custody or control of the defendant were "manufactured or partly manufactured excisable goods, namely a quantity of cut tobacco weighing 691.48 kilograms", was identified[16] as an averment that the goods fell within a statutory description. Reference was then made[17] to the statement of Fullagar J in *Hayes v Federal Commissioner of Taxation*[18] that:

> "[w]here the *factum probandum*[19] involves a term used in a statute, the question whether the accepted *facta probantia*[20] establish that *factum probandum* will generally ... be a question of law."

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15 (2003) 180 FLR 224 at 229 [17].

16 (2003) 180 FLR 224 at 230 [20].

17 (2003) 180 FLR 224 at 230 [20].

18 (1956) 96 CLR 47 at 51.

19 The proposition to be established or fact in issue. Fullagar J refers elsewhere ((1956) 96 CLR 47 at 51) to *factum probandum* as "the ultimate fact in issue". As these reasons later show, the use of the singular may be distracting.

And in this case it was said[21] that the facts constituting manufacture not being averred, and no facts other than the ultimate fact in issue being averred, that fact "was not properly the subject matter of an averment".

24 Two points must be made at once about this reasoning. First, the point at issue in *Hayes* was whether, an appeal being restricted by the relevant legislation[22] to an appeal on point of law, the appeal that had been instituted was competent. The distinctions drawn by Fullagar J in that case were directed to that issue, not any question about the operation of averment provisions. Secondly, the fact that tobacco leaf *might* be cut for purposes other than manufacture into a product suitable for consumption is beside the point. What was averred in this case was that the respondent had possession, custody or control of manufactured or partly manufactured goods of a kind described as "cut tobacco": a term not found in the Act or the Tariff Act. The relevant excisable goods were "tobacco" as that term was defined in the Schedule to the Tariff Act[23]: "tobacco leaf subjected to *any* process other than curing the leaf as stripped from the plant" (emphasis added). What are manufactured or partly manufactured goods must be understood in the light of that definition.

25 Either of the two points just identified may constitute a sufficient basis to conclude that the reasoning of the Court of Appeal was erroneous, but it is necessary to begin the examination of the issue at an anterior and more fundamental point: the relevant text of the Act and, in particular, s 144.

The averment provisions of the Act

26 The effect to be given to the averments that Customs made in the Amended Statement of Claim depends upon the construction and application of s 144 of the Act, sub-s (1) of which was set out at the start of these reasons. It is as well, however, to set out the whole of s 144. It provided:

> "(1) In any Excise prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or

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20 The material evidencing the proposition.

21 (2003) 180 FLR 224 at 230 [21].

22 *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth), s 196(1).

23 As amended, with effect from 1 November 1999, by the 2000 Tariff Amendment.

claim shall be *prima facie* evidence of the matter or matters averred.

(2) This section shall apply to any matter so averred although:

(a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or

(b) the matter averred is a mixed question of law and fact but in that case the averment shall be *prima facie* evidence of the fact only.

(3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section.

(4) Subsection (1) shall not apply to:

(a) an averment of the intent of the defendant; or

(b) proceedings for an indictable offence or an offence directly punishable by imprisonment.

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

"Excise prosecutions" were defined elsewhere in the Act[24] as "[p]roceedings by the Customs for the recovery of penalties under any Excise Act or for the condemnation of goods seized as forfeited".

27 Both parties expressly contended that no question of the constitutional validity of s 144 (or any other provision of the applicable legislation) arises in this appeal. It followed that no notice was given under s 78B of the *Judiciary Act* 1903 (Cth) that the appeal involved a matter arising under the Constitution or involving its interpretation.

28 As explained in *Re Patterson; Ex parte Taylor*[25], the precept that this Court should not decide constitutional questions unless necessary for the decision

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24 s 133.

25 (2001) 207 CLR 391 at 473-474 [248]-[252] per Gummow and Hayne JJ.

of the case is a settled practice, dating from the early days of the Court[26]. There is no reason to depart from that practice, and especially is that so when the parties disavow any argument of the point. Moreover, to express a view on a question of the constitutional validity of a federal statute, without providing an opportunity to make submissions to the Attorneys-General entitled by s 78A of the *Judiciary Act* to intervene in the proceedings for that purpose, denies procedural fairness to the polities whom those Attorneys represent.

29 Section 144 must be understood in the context provided by other provisions in that part of the Act (Pt XI) in which it is found. In particular, it is to be understood in the context of s 136 and its provision that every Excise prosecution "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". Some aspects of the operation of this provision, and the equivalent provision made in the *Customs Act* 1901 (Cth)[27], were recently considered by this Court in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[28]. For present purposes, what is important is that the averment provisions of s 144 may find application in proceedings in which there are pleadings prepared according to the rules of pleading applicable in civil proceedings.

30 It is, of course, necessary to notice, and give due weight to, the elaboration of the way in which averments may and may not be used which is contained in the provisions of the section itself. That elaboration owes much to the history of averment provisions in Commonwealth Customs and Excise legislation.

Some matters of history

31 As originally enacted, both the Act and the *Customs Act* contained averment provisions[29]. In this respect, they followed what had been done in earlier, colonial Customs legislation[30]. The application of the averment

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26 *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 590 per Higgins J.

27 s 247.

28 (2003) 216 CLR 161.

29 *Excise Act* 1901 (Cth), s 144; *Customs Act* 1901 (Cth), s 255.

30 See, for example, *Customs Act* 1890 (Vic), s 268.

provisions of the *Customs Act*, and provisions like them, generated a deal of litigation. In 1909, Higgins J said of the then form of s 255 of the *Customs Act*[31] that it was a provision "meant to throw the burden of proof on the defendant in Customs cases of disproving the charge". He said also[32] that "[i]n all Customs Acts such provisions, apparently subversive of the first principles of justice, are to be found, for experience has shown them to be necessary in consequence of the peculiar difficulty of proving offences against the Customs."

32 In *Baxter v Ah Way* and subsequent cases[33], there was a deal of debate about the reach of averment provisions. Did averments reverse the burden of proof? Could a matter of mixed fact and law be averred? What significance was to be attached to an averment if evidence was led on the subject-matter of the averment?

33 These questions were addressed in a new form of averment provision introduced into the Act in 1918[34] and into the *Customs Act* in 1923[35]. The form of averment provisions introduced was substantially identical to the form of s 144 set out earlier in these reasons. First, as is apparent from the text of s 144, an averment is prima facie evidence of the matter or matters averred[36]; it does not alter the incidence of the final burden of proof[37]. Secondly[38], an averment which

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31 *Baxter v Ah Way* (1909) 10 CLR 212 at 216.

32 (1909) 10 CLR 212 at 216.

33 See, for example, *Adelaide Steamship Co Ltd v The King and The Attorney-General of the Commonwealth* (1912) 15 CLR 65; *Symons v Schiffmann* (1915) 20 CLR 277; *Schiffmann v Whitton* (1916) 22 CLR 142; *Gabriel v Ah Mook* (1924) 34 CLR 591; *Williamson v Ah On* (1926) 39 CLR 95.

34 *Excise Act* 1918 (Cth), s 17.

35 *Customs Act* 1923 (Cth), s 35.

36 s 144(1).

37 s 144(5); *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507-508; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 166 [1] per Gleeson CJ, 166 [3] per McHugh J, 173 [34] per Gummow J, 207-208 [142] per Hayne J.

38 cf *Adelaide Steamship Co* (1912) 15 CLR 65 at 102 concerning the effect of the averment provisions in the *Australian Industries Preservation Act* 1906 (Cth).

was not confined to an allegation of fact, but alleged a matter of mixed fact and law, still had work to do – as "*prima facie* evidence of the fact only"[39]. Thirdly[40], the new form of averment provision made plain[41] that if evidence was led about a matter averred, the averment provisions of the Act still applied and the evidence given by witnesses in support or rebuttal of that matter was to be considered on its merits, the credibility and probative value of the evidence being neither increased nor diminished by reason of s 144[42]. Fourthly, the intent of the defendant could not be averred[43].

Averments in the information, complaint, declaration or claim

34 Section 144 permits the making of averments in the information, complaint, declaration or claim. At least in the case of proceedings brought according to the usual practice and procedure of a State or Territory Supreme Court in civil cases[44], it would be expected that the claim would conform to rules of court governing pleadings which require the pleading of material facts, not the evidence by which those facts are to be established[45]. And it may follow that any averments would be averments of material facts alleged in the pleading, not averments of evidence by which those material facts were to be proved. But if that does follow, it would be a consequence of the application of pleading rules which would permit matter embarrassing to the trial of the proceeding (as, for

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39 s 144(2)(b).

40 cf *Symons v Schiffmann* concerning the effect of the former s 255 of the *Customs Act*. See also *Adelaide Steamship Co*.

41 s 144(2)(a).

42 s 144(3).

43 s 144(4)(a).

44 s 134(1)(a), (b) and (c); s 136.

45 Supreme Court Rules 1970 (NSW), Pt 15 r 7(1); Supreme Court (General Civil Procedure) Rules 1996 (Vic), r 13.02; Supreme Court Rules 1987 (SA), r 46.04; Uniform Civil Procedure Rules 1999 (Q), r 149; Rules of the Supreme Court 1971 (WA), O 20 r 8(1); Supreme Court Rules 2000 (Tas), r 227(1); Supreme Court Rules (NT), O 13 r 2; Supreme Court Rules 1937 (ACT), O 23 r 4. See also Federal Court Rules (Cth), O 11 r 2.

example, allegations of evidence as distinct from material fact) to be struck out[46]. Be this as it may, it is apparent from *R v Hush; Ex parte Devanny*[47] that no encouragement has been or should be given to the preparation of averments that descend to matters of evidence rather than material fact lest the oppression evident in the 61 paragraphs of averment relied on in *Hush* be repeated.

35 Section 144 speaks of "the matter" (or "the matters") averred. The averment must be "contained in the information, complaint, declaration or claim". It is, therefore, for the drafter of the process by which the Excise prosecution is commenced to frame the averment, and the Act is otherwise silent about how that is to be done. In particular, there is no textual footing in the Act for drawing some distinction between the ultimate fact in issue and other facts or evidence.

36 Reference to the ultimate fact in issue in connection with Excise prosecutions might be understood as suggesting that there will always be a single determinative issue of fact in such a proceeding. Seldom will that be so. In the present case, demonstrating a contravention of s 117 required proof that:

(a) the respondent had certain goods in his possession, custody or control;

(b) the respondent was not a manufacturer;

(c) the respondent had no authority to have the goods in his possession, custody or control;

(d) the goods were manufactured or partly manufactured; and

(e) the goods were of a kind chargeable with excise.

None of these facts was to be singled out as more significant than the others. If any of these elements was not admitted by the respondent it could be described as an ultimate fact in issue. Nothing in the Act shows why it could not be averred.

37 The difficulty that lies beneath the use of the expression "ultimate fact in issue" is that it seeks to draw a distinction between, on the one hand, some or all

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46 cf *Hush* (1932) 48 CLR 487 at 504-505 per Rich J.

47 (1932) 48 CLR 487.

of the factual elements that must be established in the proceeding and, on the other, some other kinds of fact or evidence. That is not a useful distinction to be drawn in this context. That there is no statutory warrant for drawing the distinction is reason enough not to do so. Moreover, the distinction seems to be no more than the distinction that is drawn in common form rules of court between pleading material facts and the evidence by which those facts will be established.

38 Reference to cases like *Hayes*[48] does not support or require the conclusion that material facts or the ultimate fact or facts in issue cannot be averred. The distinction which Fullagar J made in *Hayes*[49] was between the proposition to be established and the material evidencing the proposition. That is a distinction found in the writings of Bentham[50] and Wigmore[51]. It is a distinction drawn by those authors in the context of describing the law of evidence as being concerned with the relationship between what is to be proved (the proposition to be established, whether as an ultimate fact in issue or subsidiary fact relevant to an issue) and the manner of its proof. As Bentham said[52], "[e]vidence is a word of relation". But in the present context a distinction between ultimate fact and facts adduced to prove that ultimate fact is inapposite. The averment provisions are concerned with what is to be proved. The Act provides that what is averred is to be prima facie evidence of the matter averred. Thus the Act prescribes a manner of proof (to the point of being prima facie evidence) of the matter averred. The matter averred is not then to be subdivided further, whether between material facts and evidence, or between ultimate facts and evidence, or between ultimate facts in issue and other facts going to the proof of those facts. What reference to *Hayes* does bring to attention, however, is that a pleading of the material facts alleged in an Excise prosecution may contain allegations which, on analysis, are allegations of mixed fact and law.

39 In the present case, par 4 of the Amended Statement of Claim alleged (and it was averred) that the respondent had in his possession, custody or control "manufactured or partly manufactured excisable goods". The allegation that the

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48 (1956) 96 CLR 47.

49 (1956) 96 CLR 47 at 51.

50 Bentham, *Rationale of Judicial Evidence*, (1827), vol 1, bk 1, ch 1 at 17-23.

51 *Wigmore on Evidence*, Tillers rev (1983), vol 1, §2 at 13-15.

52 *Rationale of Judicial Evidence*, (1827), vol 1, bk 1, ch 1 at 17.

goods were "excisable" goods was an allegation of legal conclusion. And if the allegation that the goods were "manufactured or partly manufactured ... goods" was to be understood as no more than an allegation that the goods met the statutory description in s 117 of the Act, that too would be an allegation of law. But read in its context, this part of par 4 of the pleading is to be understood as making allegations of mixed fact and law: that the tobacco had been subjected to one or more manufacturing processes and, for that reason, fell within the reach of s 117. The former is an allegation of fact; the latter may be an allegation of law. Section 144(2)(b) then provided that, to the extent that the allegation averred was one of fact, the allegation was prima facie evidence of that fact.

40 This in turn leads to a further aspect of the matter foreshadowed in *Labrador Liquor*. Customs sought the conviction of the respondent. The elements of the offence alleged had therefore to be established beyond reasonable doubt[53]. The averments of fact were prima facie evidence of the facts averred but it remained a matter for the primary judge, and the Court of Appeal on appeal, to say, on the whole of the material that was adduced at trial, whether the facts averred were established to the requisite degree of proof[54]. Because the Court of Appeal in this case reached the conclusion which it did about the effect of the averments, that Court did not consider whether the necessary facts were established to the requisite degree and the respondent's contentions in that Court, that the primary judge erred in finding that the material in the respondent's possession, custody or control was manufactured or partly manufactured goods, remained undetermined. It will be necessary to remit the matter to the Court of Appeal for it to consider that question.

A further question foreshadowed

41 There is then a further question which has not hitherto been raised in the proceedings in the courts below but was foreshadowed in the course of the hearing in this Court. The respondent now wishes to contend, and the appellant accepted in oral argument in this Court, that the fine imposed on the respondent at first instance exceeded the maximum allowed by law. This was said to follow from the operation of s 4F(2) of the *Crimes Act* 1914 (Cth)[55] in conjunction with

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53 *Labrador Liquor* (2003) 216 CLR 161.

54 (2003) 116 CLR 161 at 207-208 [142].

55 Section 4F(2) provides:

> "Where a provision of a law of the Commonwealth reduces the penalty or maximum penalty for an offence, the penalty or maximum penalty as

(Footnote continues on next page)

the amendments made to the Act by the *Excise Amendment (Compliance Improvement) Act* 2000 (Cth). The latter Act repealed s 129 of the Act[56] with its reference to a minimum penalty of twice the duty that would have been payable and substituted[57] a new form of s 117 specifying only maximum penalties.

42 Because this is not a question that arose in the appeal to the Court of Appeal (there being no appeal to that Court brought against sentence) it is not part of the matter that is before this Court. It will be necessary, therefore, for application to be made to the Court of Appeal on remitter to enlarge the grounds of appeal in that Court to raise this question of sentence. The parties being agreed that the sentence passed by the primary judge should be quashed, it will, of course, be a matter for that Court, if the appeal to that Court otherwise fails, whether it fixes the penalty itself or remits the matter for consideration of that aspect of the matter by a single judge of the Supreme Court.

Orders

43 The appeal to this Court should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of Victoria made on 17 December 2003 should be set aside and the matter remitted to that Court for its further hearing and determination.

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reduced extends to offences committed before the commencement of that provision, but the reduction does not affect any penalty imposed before that commencement."

56 *Excise Amendment (Compliance Improvement) Act* 2000, Sched 1, item 58.

57 Sched 1, item 52.

44 KIRBY J. This appeal, from the Court of Appeal of the Supreme Court of Victoria[58], concerns an averment contained in a statement of claim[59] filed in that Court. By the statement of claim, the Chief Executive Officer of Customs ("Customs") (the appellant) sought orders against Mr Nazih El Hajje (the respondent). Those orders included an order for the conviction of the respondent; an order imposing a penalty on him; and a claim for declarations and orders for interest and costs. This relief was sought under the *Excise Act* 1901 (Cth) ("the Act").

45 As developed at trial in the Supreme Court (where the respondent was not legally represented), the case concerned an allegation that, without lawful authority, the respondent had been found in possession of manufactured or partly manufactured goods, contrary to s 117 of the Act, upon which no excise duty had been paid and that he was liable accordingly. The manufactured or partly manufactured goods in question were alleged to have been a quantity of "cut tobacco".

46 In seeking to prove its case, as it was held to have done at trial[60], Customs relied upon averments expressed in its statement of claim. In the absence of contradictory evidence by or for the respondent, Customs alleged that it had proved the breaches of the Act to the requisite legal standard. However, the Court of Appeal decided that the averments relied on by Customs did not supply the evidence constituting the alleged breach of the Act, sufficient to uphold the orders made at trial. Accordingly, that Court set aside the orders of the primary judge and entered a general judgment for the respondent. Now, by special leave, Customs appeals to this Court.

The facts and legislation

47 *The facts*: The facts, so far as they appear from the pleading and from the evidence adduced at the trial, are stated in the reasons of McHugh, Gummow, Hayne and Heydon JJ ("the joint reasons")[61]. Those facts include the terms of the statement of claim, including the averments relied on by Customs "[t]o the extent permitted by law"[62]; the circumstances of the police interception of the respondent; the course of the trial; and the findings of the primary judge.

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58 *El Hajje v Chief Executive Officer of Customs* (2003) 180 FLR 224.

59 The statement of claim was amended by order of the primary judge in the Supreme Court of Victoria (Byrne J) on 18 July 2002.

60 *Chief Executive Officer of Customs v El Hajje* [2002] VSC 286 at [9].

61 Joint reasons at [5], [15]-[18].

62 Statement of claim, par 20.

48 *The legislation*: Likewise, the provisions of the Act expressing the offence found at trial (s 129 of the Act read with s 117) and the history and terms of the Act and of the *Excise Tariff Act* 1921 (Cth) are sufficiently described in the joint reasons[63]. Those reasons also set out the terms of s 144 of the Act, providing, in any excise prosecution, for averments to be pleaded which, by force of that section, are to be "*prima facie* evidence of the matter or matters averred"[64].

49 The function of an averment is "to allege, against the accused matters which, as alleged, constitute an offence"[65]. As such, an averment provision such as that appearing in s 144 of the Act[66]:

> "does not place upon the accused the onus of disproving the facts upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus".

50 In common law pleadings, averments (sometimes called "verifications") were of two kinds: common and special. Common averments were applied to ordinary cases. Special averments were used when the matter pleaded was intended to be tried on the record or by some method other than trial by jury[67]. The word "averment", as it came to be used in statutes of the 20th century, generally referred to "the essential part of the offence"[68]. So far as they are

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63 Joint reasons at [8]-[13].

64 Joint reasons at [26].

65 *Ex parte O'Sullivan; Re Craig* (1944) 44 SR (NSW) 291 at 299 per Jordan CJ. See also *Neil Pearson & Co Pty Ltd v Comptroller-General of Customs* (1995) 38 NSWLR 443 at 460-461.

66 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507-508 per Dixon J. As to standard of proof see *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* ("*Labrador*") (2003) 216 CLR 161.

67 Jowitt (ed), *The Dictionary of English Law*, (1959), vol 1 at 188.

68 *Baxter v Ah Way* (1909) 10 CLR 212 at 216 per Higgins J. See also Anderson, "Averments" (1945) 19 *Australian Law Journal* 102 at 102-103. Paul in "The 'Averment of the Prosecutor' in Criminal Charges", (1940) 14 *Australian Law Journal* 4 at 6 wrote that "'Archbold on Criminal Pleadings' (27th ed) ... seems to speak of averments as including every material ingredient of the offence charged".

lawful and effective, averments clothed with the authority of s 144 are thus a great boon to prosecutors. They are aimed at relieving prosecutors of having to prove essential matters. Whilst not shifting the *legal* onus, they certainly relocate the *evidentiary* and *forensic* onus. In practice, they therefore have a significant potential to burden defendants in resisting proceedings brought against them. To that extent, they have a tendency to undermine the accusatorial nature of criminal process which is an important feature of criminal law and procedure in Australia[69].

The decisional history of the case

51 *Decision of the primary judge*: The joint reasons describe the decision of the primary judge[70]. On the basis, partly, of the averments in the statement of claim, the primary judge concluded that the goods found in the respondent's possession were "manufactured excisable goods" upon which duty had not been paid and that they were in the respondent's possession without lawful authority[71]. His Honour found that the unpaid excise duty payable on those goods, namely the "cut tobacco", was $165,567.97. He convicted the respondent of the offence against s 117 of the Act and ordered him to be fined $331,135.94[72]. As well, the goods were condemned as forfeit to the Crown – an order of the primary judge that, curiously, was not the subject of appeal[73], nor included in the contest in this Court.

52 *Decision of the Court of Appeal*: In the Court of Appeal, various grounds of appeal were rejected by Buchanan JA (who gave the reasons of that Court)[74]. They need not trouble this Court. Ultimately, his Honour reached the point concerning proof of the case that was found to be determinative and is the subject of the present challenge.

53 After describing the evidence at trial relating to what the Customs officers found, and the description they gave in evidence about the tobacco in the respondent's truck, Buchanan JA pointed out that no witness had stated facts

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69 cf *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

70 *El Hajje* [2002] VSC 286.

71 *El Hajje* [2002] VSC 286 at [5].

72 *El Hajje* [2002] VSC 286 at [12]. By s 129 of the Act, the penalty imposed was twice the amount of duty payable on the excisable goods.

73 See amended notice of appeal, 13 September 2002.

74 (2003) 180 FLR 224 at 228 [14] (Phillips and Batt JJA concurring).

constituting the alleged steps in the "manufacture" of tobacco[75]; nor did any statutory definition of "manufactured" supply that omission. He concluded that the word "manufactured" was a word of general denotation, to be given meaning according to its ordinary acceptation in the English language. Buchanan JA went on[76]:

> "It could hardly be said that every cut tobacco leaf constituted manufactured or partly manufactured tobacco. Tobacco leaf might be cut for purposes which have nothing to do with manufacture into a product suitable for consumption. I do not think that tobacco leaf cut to enable it to fit into bags so that it could be transported could properly be described as manufactured or partly manufactured tobacco."

54 In taking this rather strict view of the meaning of the word "manufactured" in this context, and of the evidence, Buchanan JA was affected by the reasoning in the then recent decision of this Court in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[77]. That decision concluded that the appellant was required to prove such a case at trial to the standard of proof beyond reasonable doubt. In such circumstances, a measure of strictness in the construction of the legislation having punitive consequences and strictness in the assessment of the evidence adduced at trial was not unorthodox[78].

55 The issue, thus presented, was whether any defects in the evidentiary foundation provided at the trial were cured by Customs' averments and by the legal effect given to them by s 144 of the Act. Buchanan JA determined that question against Customs. He did so (as noted in the joint reasons)[79] by reference to his Honour's understanding of the principles stated by Fullagar J in this Court in *Hayes v Federal Commissioner of Taxation*[80]. He also referred to the decision of the Full Court of the Federal Court of Australia in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[81]:

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75 (2003) 180 FLR 224 at 228 [15].

76 (2003) 180 FLR 224 at 229 [17].

77 (2003) 216 CLR 161.

78 See *R v Adams* (1935) 53 CLR 563 at 567-568; *Beckwith v The Queen* (1976) 135 CLR 569 at 576.

79 Joint reasons at [23].

80 (1956) 96 CLR 47 at 51.

81 (1993) 43 FCR 280 at 287.

> "The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law".

56 Accepting this approach to the lawful ambit of Customs' averments, Buchanan JA reached his conclusions. In fairness to those conclusions, which are thoughtful and require response from this Court, I will set out the passage that explains the approach taken by the Court of Appeal[82]:

> "In the present case, the facts that constituted manufacture were not averred. The averment stated no facts other than the ultimate fact in issue, the *factum probandum*. In my view, in this case that was not properly the subject matter of an averment. The position would have been different if the matter averred had been a statement that it is a process in the manufacture of tobacco that tobacco leaf be cut in a particular manner and that tobacco leaf cut in that manner was in the possession of the appellant. The averment, however, did not take that form. It was a statement that the appellant had cut tobacco in his possession and cut tobacco constituted manufactured goods. As I have said, tobacco can be cut otherwise than in the process of the manufacture of goods. The averment implied that particular circumstances existed and fell within the statutory description of manufactured or partly manufactured excisable goods. The existence of those circumstances involved questions of fact, but the circumstances were not averred. The averment omitted to state any facts that showed that the tobacco in the possession of the appellant was cut in a manner that converted the tobacco into manufactured or partly manufactured goods."

57 The question before this Court is thus whether the foregoing approach was correct or demonstrated legal error. In light of the Constitution, the applicable statutory law, legal authority on averments and the facts of the present case, has it been shown that the Court of Appeal erred in adopting the foregoing approach and in the conclusion in favour of the respondent to which that approach led it?

The issues

58 The following issues arise from the foregoing description of the case:

(1) *The constitutional issue*: Whether, having regard to the Constitution, either as a matter of power or so as to ensure that the applicable statutory provision and judicial determination remain within power, the strict approach to the permissible content of averments in proceedings brought

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82 (2003) 180 FLR 224 at 230 [21] (citation omitted).

in federal jurisdiction, as adopted by the Court of Appeal, should be upheld in the circumstances of this case. Must s 144 of the Act be read, for constitutional reasons, so as to avoid averments in federal jurisdiction that amount to averments of matters of law; or matters of mixed law and fact involving the "application of a legal standard"[83]?

(2) *The pleading issue*: Having regard to the answer to issue 1, or irrespective of its answer, is it a settled principle of the law of pleadings that averments may not be pleaded which foreclose the resolution of the real, or ultimate, issue by a court in proceedings, so that, tested against such a standard, the approach adopted by the Court of Appeal was correct in the present circumstances and this notwithstanding the terms of s 144 of the Act?

(3) *The statutory issue*: In the light of the answers to issues 1 and 2, and having regard to the provisions of s 144 of the Act, did the Court of Appeal err in failing to give effect to the averments relied on by Customs in this case, to the extent that any averment of mixed law and fact, pleaded by Customs, was nonetheless applicable by virtue of the operation of s 144 of the Act, and therefore available to Customs in its proceedings against the respondent?

(4) *The remitter issue*: Having regard to the answers to issues (1), (2) and (3), is it necessary to remit to the Court of Appeal, for reconsideration, the outstanding questions (a) whether the decision at trial ought to have been in favour of the respondent, having regard to the standard of proof applicable to the case as explained in *Labrador*[84], and (b) whether, taking into account the applicable law, the fine imposed on the respondent must in any event be varied.

The constitutional issue

59 *How the issue arises*: Neither party to this appeal, whether in the Court of Appeal or in this Court, raised any specific question concerning the Constitution or submitted that it was relevant to the resolution of the issues in this case. Both

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83 cf *R v Palmer* [1981] 1 NSWLR 209 at 214 per Glass JA. See now *Uniform Evidence Acts*, s 80(a); Anderson, Hunter and Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts*, (2002) at 255; Heydon, "The Impact of sections 76-80 of the Evidence Acts 1995 on Opinion Evidence: Recent Cases", (1999) 18 *Australian Bar Review* 122 at 128. See also *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 306 [110].

84 (2003) 216 CLR 161.

in written and oral submissions, Customs and the respondent asserted that no constitutional issue arose[85].

60 The Constitution is the supreme law of the nation. It is not for parties, by their pleadings, conduct of their cases or agreement[86], to impose on a court an obligation to make orders and decide issues without regard to the Constitution where it is relevant[87]. By command of the Constitution itself, this Court and all Australian courts are obliged to obey its requirements[88]. No provision of statute[89], nor any rule of the common law or of court practice, could negative that fundamental duty[90].

61 From the earliest days of the Commonwealth (as pointed out in the joint reasons)[91], averments have been a feature of excise prosecutions and of the federal legislation providing for them. The supposed justification for provisions in the Act such as s 144, stated from early times, was the existence of similar United Kingdom practice. This rested on the suggested "peculiar difficulty" of otherwise proving offences against the Customs[92].

62 This line of authority has been accepted for a century, without substantial questioning as to whether the practice of pre-federation British statutes, concerning Customs offences, could be imported without modification, into the quite different constitutional environment of the Australian Commonwealth, with its express provisions for an independent judicature and the separation of the judicial power of the Commonwealth, with all that that implies. Legal minds can sometimes be locked in the history books. Blinded by history they may fail to perceive a new legal problem.

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85 See [2005] HCATrans 34 at 50, 1267.

86 See eg *Lambert v Weichelt* (1954) 28 ALJ 282.

87 See eg *Croome v Tasmania* (1997) 191 CLR 119 at 127-128, 132.

88 Constitution, covering cl 5.

89 eg *Judiciary Act* 1903 (Cth), s 78B.

90 *Solomons v District Court of New South Wales)* (2002) 211 CLR 119 at 154-155 [87]-[91]; *Roberts v Bass* (2002) 212 CLR 1 at 54 [143].

91 Joint reasons at [1]. See also *Labrador* (2003) 216 CLR 161 at 207-208 [140]-[143].

92 *Baxter v Ah Way* (1909) 10 CLR 212 at 216 per Higgins J. See also the cases referred to in the joint reasons at [32] fn 33.

63 No one denies the importance of legal history and the guidance it gives for the resolution of contemporary questions. However, in the Australian context, all such questions, and the answers they suggest, must ultimately be measured, where relevant, against the Constitution. The earlier resolution of such questions in the United Kingdom, where no equivalent constitutional questions arose, cannot be determinative of the resolution of such questions in Australia. So much is self evident; but it needs to be stated in this case.

64 The special problem of grafting averment provisions, such as appear in s 144 of the Act, onto federal legislation in Australia, was perceived from the start by some of the early judges of this Court. They did not, however, in my respectful view, give sufficient attention to whether a difficulty was presented by a constitutional impediment. Thus, in *Baxter v Ah Way*[93], Higgins J acknowledged that the averment provisions in the Customs Acts of the Commonwealth were "meant to throw the [evidentiary] burden of proof on the defendant … of disproving the charge". His Honour declared that such a shift of onus was "apparently subversive of the first principles of justice". However, he justified such "subversion" by reference to what he declared was "necessary in consequence of the peculiar difficulty" of such cases.

65 This justification of supposed necessity (or prosecutorial convenience) is scarcely convincing when viewed from a constitutional standpoint. It will often be difficult for the prosecution to prove elements in criminal offences. In our system of government, that is conventionally regarded as rightly so. For centuries, this has been the response of our law to complaints of prosecutorial "difficulty" and suggestions of "necessity" to overcome them. As early as 1477, Brian CJ, addressing the peculiar difficulty faced by the prosecution in proving that an accused acted as he did with the intent requisite to establishing the offence charged observed that "[t]he thought of man is not triable, for the devil himself knows not the thought of man"[94]. Yet it remained for the prosecution to prove the element of intent in offences at common law and the "difficulty" of doing so did not afford a reason to bend the rule[95].

66 When it comes to constitutional requirements, it is not the usual answer (and may not be a valid answer) to enact laws that reverse the onus of proof and impose on the accused a duty to show an innocent intention and then to say that

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93 (1909) 10 CLR 212 at 216.

94 *Year Book* (1477) 17 Edw IV 1.

95 *Greene v The King* (1949) 79 CLR 353 at 357. The principle is expressed in the Latin maxim *cogitationis poenam nemo patitur*.

such laws are enacted to meet practical difficulties, otherwise arising. Doubtless, officials and prosecutors find "peculiar difficulty" in proving offences having particular features. Counter-terrorism and anti-drug trafficking legislation springs to mind. Yet the answer to such difficulties is not necessarily to uphold averments to overcome all problems of proof or invariably to shift the evidentiary burden (or even the legal burden) to the accused. The constitutional answer to whether such expedients are available is by no means clear cut.

67 Test it this way. There is a serious question as to whether it would be possible under the Constitution, to reverse the onus of proof of every federal offence or to provide that all relevant elements of fact and law necessary to constitute an offence could henceforth be averred by the Commonwealth and thus bind federal courts, in the trial of such offences, to a trivial function incompatible with that of a judicial body of the type envisaged by the Constitution. There must be a limit to the extent to which federal legislation could impinge on the activities of federal courts where the result would be to rob them of substantial functions as courts of the kind that the Constitution contemplates.

68 In the past, issues such as this have sometimes been decided by this Court by reference to the question whether attempts to permit averments and to alter the burden of proof in federal matters are constitutionally infirm because they have lost the essential connection with "the root of the existence of federal power"[96]. However, this is not the source of constitutional infirmity that concerns me. My concern relates to the compatibility of averment provisions in certain forms with the implications about judicial power and the judicature inherent in Ch III of the Constitution. That issue has previously been raised by this Court[97]. However it was not fully explored in *Baxter*, nor pursued in detail in *R v Hush; Ex parte Devanny* where observations were made that were critical of the practice of relying on averments in federal prosecutions, evident in an extreme form in the latter case[98]. The problem was clearly on the mind of Griffith CJ delivering the

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96 See eg, Wynes, *Legislative, Executive and Judicial Powers in Australia*, 4th ed (1970) at 124-125 cited by Gibbs J in *Milicevic v Campbell* (1975) 132 CLR 307 at 317.

97 *Adelaide Steamship Co Ltd v The King* (1912) 15 CLR 65 at 102; *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 515; cf *R v Associated Northern Collieries* (1911) 14 CLR 387 at 404.

98 (1932) 48 CLR 487 at 510. Evatt J said (at 513-514) that the initiating document in that case was an "amazing" one, consisting of 27,453 words, designed to "induce the magistrate to accept this queer medley as satisfactory proof of everything averred".

judgment of this Court in *Adelaide Steamship Co Ltd v The King*, where his Honour reserved the point with these words[99]:

> "We express no opinion on the point taken by [counsel] that [the averment provision], read literally, is an attempted interference with the judicial power of the Commonwealth, by seeking to impose upon the Courts the duty of passing sentence without trial."

Thus, from the early days of this Court the need to contemplate constitutional limitations upon statutory averment provisions has been noted but not finally decided – perhaps awaiting a more extreme instance of offence to the judicial power and functions provided for in Ch III of the Constitution.

69 It is true that s 144 of the Act, relied on by Customs in the present appeal, does not go to such extremes. Thus, it does not provide that an averment shall be *conclusive* evidence of the matters averred[100]; that it will be accepted whatever evidence is otherwise given by witnesses[101]; that it will bind the Court in the resolution of any question of law[102]; that it will apply to prove the intent of the defendant[103]; that it will govern indictable offences tried before juries as s 80 of the Constitution provides and bind such juries[104]; or that it will alter the onus of proof otherwise falling on the defendant[105].

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99 (1912) 15 CLR 65 at 102. See also *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 515 per Evatt J: ("No Court exercising the judicial power of the Commonwealth could allow the prosecutor's *ex parte* statement of what the document means to outweigh the Court's own construction of the document."); cf *R v Associated Northern Collieries* (1911) 14 CLR 387 at 404 per Isaacs J: ("So far as its validity is concerned ... it is desirable to state that I do not abstain from acting upon [the averment provision] from any present doubt as to its constitutionality. It is a stringent provision casting the initial burden of proof upon the defendants in certain cases, but as I read the section that is all. It still leaves it to the judicial tribunal to determine on recognised principles the issue of guilt or innocence upon any evidence that may be adduced.")

100 cf the Act, s 144(1).

101 cf the Act, s 144(2)(a).

102 cf the Act, s 144(2)(b).

103 cf the Act, s 144(4)(a).

104 cf the Act, s 144(4)(b).

105 cf the Act, s 144(5).

70 However, legislation providing for averments can be amended by the Parliament in circumstances of supposed "necessity" and "peculiar difficulty" for prosecutors. Constitutional questions then present themselves. They must be resolved by reference to considerations of basic principle. At the very least, the imposition upon federal courts (or State courts exercising federal jurisdiction) of a supposed duty to decide a "matter … [that] is a mixed question of law and fact" potentially intrudes upon the capacity of such courts to decide such issues independently, and especially as they involve to any important degree a "question of law". Similarly, where a "legal standard" is involved, it is doubtful, in my view, that it is competent for the Federal Parliament to instruct federal courts (or courts exercising federal jurisdiction) to apply such a standard in any way differently than the law and the independent discharge of the judicial function demand. On the face of things, any attempt in federal legislation to provide in that way would be an intrusion by the legislature into the function of the judicial branch of government and invalid under the Constitution to that extent.

71 *The issue is not argued*: None of the foregoing questions has been argued in this appeal. This is so although they were raised by me during the oral submissions. The passage of time and the accumulation of experience have resulted in a greater appreciation on the part of this Court of the importance of the constitutional separation of the judicature[106]; of the necessity to preserve that separation as a central feature of the federation; and of the implications that derive from the operation of the judicature as the Constitution envisages[107]. Today, issues such as the foregoing, when raised, would not be approached, as in the past, only in terms of whether averments, or other federal procedural laws, had lost their essential connection with the requisite federal legislative power. They would now be decided by reference, as well, to whether such enactments were inconsistent with Ch III of the Constitution, and with the implications to be derived from its provisions.

72 In my reasons in *Labrador*[108] I noted that the appellant in that case put in issue a constitutional argument. It was an argument that was advanced defensively. It suggested that, if the federal Acts in question in that case, on their proper construction, permitted proof of the guilt of the elements of the offences alleged against the appellants to be determined according to a civil standard of

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106 see eg *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

107 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

108 (2003) 216 CLR 161 at 176-177 [49].

proof, such a construction would offend implications inherent in s 71 of the Constitution. In the event, having regard to the conclusion that the criminal standard of proof applied, the constitutional question did not have to be addressed[109].

73 Had it been necessary, this Court would, in that case, have had to consider the respondents' arguments about the due process implications said to arise from Ch III of the Constitution[110]. In two extra-curial papers, Justice McHugh has recently argued that such questions will require the attention of this Court before long[111]. In the latest of those papers, Justice McHugh predicted that "constitutional practitioners will see a rich lode of constitutional ore in Ch III of the Constitution[112]. I agree. Perhaps blinded by the way such issues have been addressed in the past, the parties to the present appeal did not venture upon any such exploration. It involved questions they were not prepared to argue. However, that does not mean that the issue is irrelevant to the task of interpretation before this Court and to the disposition of this appeal.

74 *The Constitution and interpretation*: It is impossible to disjoin interpreting a federal law (such as the Act) from the Constitution. The basic law provides the most important contextual element for elucidating the meaning to be attributed to a statutory provision whilst remaining constitutionally valid. It provides the life-blood of power and it charts the constraints and restrictions that necessarily inform the law's meaning. Attempts to disconnect the task of interpretation from the constitutional source are merely extreme examples of the belief, now generally discredited, that words alone in the written law yield legal meaning. Context is as important as text. In the Australian Commonwealth, in respect of federal laws, context inevitably includes the Constitution. Some of the dicta in the reasons of this Court in its early days, suggesting disregard for constitutional considerations, can only be understood today as relics of the former literalistic and purely verbal approach to statutory interpretation that focused on words and ignored context. We should not now restore that approach for it is not the way meaning is derived from written language in everyday life[113].

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109 *Labrador* (2003) 216 CLR 161 at 191 [93].

110 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.

111 eg McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235 at 238-240.

112 McHugh, "Review of *Australian Constitutional Landmarks*", (2004) 7(1) *Constitutional Law and Policy Review* 21 at 24.

113 *Palgo Holdings Pty Ltd v Gowans* (2005) 215 ALR 253 at 263 [37].

75 This is why today the starting point for legislative construction is commonly a consideration of any applicable constitutional norms. This is not simply a view that I have expressed[114]. Other members of this Court have also approached the problem of meaning in particular cases from the starting point of any relevant considerations of constitutional context[115].

76 In other countries, with written constitutions constraining governmental power, it is a commonplace to approach the ascertainment of the meaning of legislation by reference to any relevant constitutional considerations. Thus, the South African Constitutional Court has recently affirmed[116]: "The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation." Similarly, the Supreme Court of Canada has said that the values expressed in the constitutional *Charter of Rights and Freedoms* "must be at the forefront of statutory interpretation"[117]. In the United States too, it is generally accepted that constitutional norms inform performance of the task of judicial interpretation[118]. Indeed, in the United States, the debate has moved beyond this point. It is now more concerned with elucidating contemporary

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114 *Re Colonel Aird; Ex parte Alpert* (2004) 78 ALJR 1451 at 1465-1467 [81], [83]-[84]; 209 ALR 311 at 331-332; *Solomons v District Court of NSW* (2002) 211 CLR 119 at 155 [91]; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of Victoria* (2001) 207 CLR 72 at 88 [41].

115 *Coleman v Power* (2004) 78 ALJR 1166 at 1199 [184] per Gummow and Hayne JJ; 209 ALR 182 at 227; *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1103 [10], 1105-1106 [19]-[20], [22] per Gleeson CJ, 1121 [111] per Gummow J; 208 ALR 124 at 128, 130-131, 153; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492-493 [28], [30]-[32] per Gleeson CJ; *CDJ v VAJ* (1998) 197 CLR 172 at 196 [90] per McHugh, Gummow and Callinan JJ.

116 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] (4) SA 490 at 521 [72] (citation omitted).

117 *Symes v Canada* [1993] 4 SCR 695 at 794 per L'Heureux-Dubé J (in dissent). See also *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1078 per Lamer J; *Hills v Canada (Attorney General)* [1988] 1 SCR 513 at 558 per Dickson CJ, Wilson, La Forest and L'Heureux-Dubé JJ.

118 eg Eskridge, Frickey and Garrett, *Legislation and Statutory Interpretation*, (2000) at 347; Sunstein, "Interpreting Statutes in the Regulatory State", (1989) 103 *Harvard Law Review* 405 at 459.

methodologies of statutory interpretation that conform to the Constitution[119]. The basic premise is not contested.

77 No statute and no rule of court practice in this country could excuse ignoring the Constitution, where it is relevant to a task of interpretation. The joint reasons[120] suggest that reference to the constitutional background is impermissible in this appeal because of the past practice of this Court and the provisions of s 78B of the *Judiciary Act* 1903 (Cth). This is not correct. The practice referred to is confined to avoiding *decisions* on constitutional questions that are *unnecessary* to the issues in a matter. In the present case, it is relevant, and not unnecessary, to construe the averment provisions by reference to constraints deriving from the Constitution. I reject the opinion that the Constitution can be ignored or that this Court's practice requires that course. Many recent cases prove the contrary.

78 Nor, in the ultimate, is there any procedural unfairness to the polities or persons referred to in s 78B of the *Judiciary Act*[121]. In this appeal, the constitutional norms are not, ultimately, determinative. But that does not mean that they may be ignored in fulfilling the task committed to this Court. Where federal legislation is in issue, the Constitution provides the background against which statutory interpretation takes place. In this sense, the Constitution is always the starting point even if only sub-consciously. Furthermore, many interpretative principles are themselves a product of constitutional elaboration. Parties, by their arguments and pleadings, cannot oblige a court to ignore a consideration important to interpretation – least of all where that consideration is found in the Constitution.

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119 See eg Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (1997) at 35; *Bank One Chicago v Midwest Bank & Trust Co* 516 US 264 at 279 per Scalia J (1996); Mashaw, "Textualism, Constitutionalism and the Interpretation of Federal Statutes", (1991) 32 *William and Mary Law Review* 827 at 839; Manning, "Textualism and the Equity of the Statute", (2001) 101 *Columbia Law Review* 1; Eskridge, "All About Words: Early Understandings of the 'Judicial Power' in Statutory Interpretation, 1776-1806", (2001) 101 *Columbia Law Review* 990; Manning, "Response: Deriving Rules of Statutory Interpretation from the Constitution", (2001) 101 *Columbia Law Review* 1648; Rosenkranz, "Federal Rules of Statutory Interpretation", (2002) 115 *Harvard Law Review* 2085. In the Australian context see Corcoran, "The Architecture of Interpretation: Dynamic Practice and Constitutional Principles", in Corcoran and Bottomley (eds), *Interpreting Statutes*, (2005) 31 at 33-38.

120 Joint reasons at [27]-[28].

121 cf joint reasons at [28].

79 *The Constitution and this case*: It follows that, by force of legislation[122] and of necessity, federal statutes must be read, so far as possible, to conform to constitutional requirements. There are therefore limits to the extent to which an averment provision in federal legislation, such as s 144 of the Act, can diminish the function of federal courts in resolving controversies and deciding matters presented by law. It is not possible to reduce federal courts (or State courts exercising federal jurisdiction) to cyphers of the Executive Government by the simple expedient of shifting the burden of proof to persons accused of penal offences and imposing upon courts the resolution of questions that involve legal determinations, otherwise than in accordance with the applicable law as decided by such courts.

80 Doubtless because the Parliament itself is alert to such limitations[123], enactments providing for the legal effect of averments (and practices adopted by prosecutors) prevent most cases from arising that might involve an excess of federal legislative power. Nevertheless, provisions such as s 144 of the Act must be read against the constitutional background that I have outlined. Although these considerations are not expressed in their reasons (doubtless because they were not raised in argument) I take them to have informed the general approach of the judges in the Court of Appeal to the issue which that Court identified in the present case. The concern of the Court of Appeal was about the matters properly preserved in this country to the decision of the judiciary. In the case of federal legislation in Australia, that concern rests ultimately upon constitutional considerations.

81 In so far as it considered that an averment might not conclusively determine what was a question of law,[124] or oblige a court finally to decide what was an "ultimate fact", the Court of Appeal was protecting the irreducible jurisdiction of a court exercising federal jurisdiction. In doing so, the Court of Appeal's instincts were, in my view, correct. They reflected the approach to be taken conformably with the requirements of Ch III of the Constitution and of the judicature that the Constitution establishes. The Constitution establishes courts intended to have *real* functions, not tribunals forced by statute (through averment provisions or otherwise) to rubber stamp assertions made by the Executive and

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122 *Acts Interpretation Act* 1901 (Cth), s 15A.

123 Australian Parliament, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Modern-day usage of averments in customs prosecutions*, (2004) at 7-12 [1.19]-[1.32] and ch 2. See Else Mitchell, "A Note on Averments", (1945) 19 *Australian Law Journal* 178 at 178-179.

124 cf *Brady v Thornton* (1947) 75 CLR 140 at 147.

its agencies, including Customs. This Court, as the ultimate guardian of the Constitution, should be vigilant against the risks of averment provisions that would have a consequence of reducing the judicial function to nothing of substance because all matters of substance are settled by enacted presumptions, whether by a reversed onus or conclusive averments. A constitutional court, such as this, must always be looking down the years. It must do so lest an extreme case, close to the boundary of constitutional power, becomes a precedent for impermissible governmental and legislative action that endangers the basic constitutional design.

82 Because these precise constitutional questions were not argued in this appeal, it is impossible to decide them without the assistance necessary for that purpose. In default of argument, I am not finally convinced that s 144, as it may be read in the present context, is constitutionally invalid. Thus, I do not presently regard that section as offensive to Ch III or as unconnected with the requisite federal head of legislative power[125]. Nevertheless, in addressing the remaining issues, it is, in my view, essential to keep in mind the need to interpret the Act, and specifically the provisions of s 144, in a way that conforms to the fundamental presuppositions of the Constitution concerning the function of the judicature in resolving federal controversies in a manner compatible with the function of courts, performing their duties as the Constitution envisages them.

The pleading issue

83 *A strict approach to pleading*: In the inference that it drew from the reasoning of Fullagar J in *Hayes*[126], the Court of Appeal adopted a stringent view about the extent to which averments could bind a court to a conclusion that the statutory ingredients in issue had been established by the matters averred. Because of the constitutional considerations that I have mentioned, I am far from convinced that the approach adopted by Fullagar J, and accepted by the Court of Appeal in this case, was inappropriate or inapplicable to the question for decision[127]. If, in effect, a party is to be tried and found guilty of a federal offence, it is legitimate to demand that the facts be proved to the requisite standard and that real questions concerning the legal ingredients of the offence remain for determination by the relevant court.

84 Two elements in this case occasion concern. They proved determinative for the Court of Appeal. The first is that the facts alleged to constitute

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125 See eg Constitution, s 90; cf *Ha v New South Wales* (1997) 189 CLR 465.

126 (1956) 96 CLR 47 at 51. See joint reasons at [38].

127 cf joint reasons at [38]-[39].

"manufacture", so as to bring the tobacco leaf in question within the requirement for the imposition of excise duty under the Act, were not averred (assuming that to be permissible) or otherwise proved. The second concern is that one of the averments, relied upon by the prosecution, expressly asserts a legal (statutory) standard. This averment is found in par 19 of the statement of claim which includes the contention (summarising Customs' case) that the respondent "contrary to subsection 117(1) of the *Excise Act 1901* [had] in his possession, custody or control manufactured or partly manufactured *excisable goods*, namely a quantity of cut tobacco …" (emphasis added).

85 Is it permissible for Customs, in an averment purportedly having effect under s 144 of the Act, to bind the court deciding the case (and the defendant) to a view of the Act as to what is "excisable" or not? In other words, is it permissible for the appellant, with the consequences that s 144 of the Act enacts, to assert that the goods in question are "manufactured" and that they are "excisable", although those are the central questions to be decided by a court, performing its functions as a court, on the basis of the application of the enacted law to the facts, as found?

86 *The statutory provision*: In my view it was not competent for Customs to plead that the goods, the subject of its proceedings, were "excisable". That was equivalent to a statement that the goods met all the legal and factual requirements to engage the Act. It was thus a statement of law, or of a legal conclusion, that offended applicable pleading principles that confine the pleader to an expression of the facts necessary to the applicable law, leaving it to the court concerned to apply that law and reach its conclusions[128]. Nevertheless, in this case, I would be willing to treat the word "excisable" in the statement of claim as immaterial surplusage, appearing as it does in the paragraph that simply summarises what is contended.

87 Of greater concern is the question that led the Court of Appeal to its eventual conclusion, namely that it was impermissible for Customs to treat "manufactured" as a matter of fact and that, necessarily, it involved the application of a legal standard that it was for the Court to ascertain and apply, not for a party to assert in an averment that purportedly attracted legal consequences.

88 *The provisions of s 144(2)(b)*: This consideration brings me to s 144(2)(b) of the Act which states that:

"This section shall apply to any matter so averred although:

...

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128 See joint reasons at [39].

(b) the matter averred is a mixed question of law and fact but in that case the averment shall be *prima facie* evidence of the fact only."

89 Clearly, this provision was drafted with a view to avoiding constitutional issues of the kind that I have mentioned. There may be questions as to the validity of the paragraph, to the extent that it attempts by averment provisions, to affect a court exercising federal jurisdiction in the resolution of any "question of law". I say this, notwithstanding the moderated consequence of any such determination as set out in the provisions of the Act that I have quoted. However, in this case, the respondent has not mounted such a challenge. I am disinclined to make it for him. Unless the provision is constitutionally invalid, it is the duty of an Australian court to give effect to it, although a court would read it (so far as its language permitted) to avoid constitutional infirmity or excess.

90 Determining whether "cut tobacco" is, as such, "manufactured" or not, within the meaning of the Act, involves a "mixed question of law and fact". As such, it attracted s 144(2)(b) of the Act according to its terms. To that extent, the averments in the statement of claim, so asserting, had the consequences for which s 144(2)(b) of the Act provided.

The statutory issue

91 *Duty to the legislation*: So long as a federal law is valid, courts must give effect to it in accordance with its language and so as to achieve its apparent purposes[129]. Because the respondent did not attack the validity of s 144 of the Act, and specifically of s 144(2)(b), the question for the Court of Appeal was whether that paragraph had the effect that Customs asserted. It was not whether, in accordance with general principles of the common law of pleading or otherwise, the averment in par 19 of the statement of claim was too wide.

92 The Court of Appeal did not address the correct question of the application of s 144(2)(b) of the Act. It was not enough that there should be distinctions between questions of fact and questions of law[130]. Here there was a question of mixed fact and law. Unless s 144(2)(b) was wholly invalid, or unless it should be read down in some way, the Court of Appeal was obliged to give it effect in accordance with its terms. Relevantly, those terms are clear.

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129 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

130 *El Hajje* (2003) 180 FLR 224 at 230 [20].

93 Assuming that it was permissible to read s 144(2)(b) down, so that if an ultimate question of law were presented it would not be a "mixed question of law and fact" within that paragraph, there was certainly evidence which, together with the operation of the averment, was available to the primary judge for use in resolving the applicable question for decision. As the Court of Appeal itself noted, one witness at the trial described the tobacco found in the appellant's truck as "cut tobacco". On occasion, that witness equated this to "manufactured tobacco", although he did not descend into greater detail in his description of the form or character of the cutting[131]. Another witness described the tobacco as "cut tobacco ready for use"[132]. This evidence, together with the averment, applicable in terms of the Act as to mixed questions of law and fact, was available to the primary judge to assist in reaching a conclusion that the cut tobacco in question was indeed "manufactured". It therefore sustained the decision at trial.

94 *Conclusion: error is shown*: The result is that, so long as s 144(2)(b) of the Act is a valid law of the Commonwealth, it permitted the primary judge to conclude, as he did, that the cut tobacco was "manufactured or partly manufactured … goods, namely ... of cut tobacco"[133]. Although reaching that conclusion involved the application of a legal standard, it did so in a manner permitted by s 144(2)(b) of the Act. The only way that the respondent could have overcome that conclusion was by challenging the validity of that law. This he failed, and in this Court declined, to do.

95 In another case where the validity of s 144(2)(b) of the Act was directly challenged and subjected to a test by reference to the requirements of the Constitution (including the requirements implicit in Ch III) a different conclusion might possibly be reached. But in this appeal, no different conclusion should be adopted. To that extent, I agree with the joint reasons that s 144 of the Act does not provide an adequate statutory foundation for the distinction drawn by the Court of Appeal. This is so even if that paragraph is read down so as to avoid an impermissible intrusion into the functions of the judiciary deciding matters involving pure questions of law.

The remitter issue

96 On the basis explained in the joint reasons, I agree that the remaining questions in the appeal[134] cannot be resolved by the simple restoration of the

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131 (2003) 180 FLR 224 at 229 [17].

132 (2003) 180 FLR 224 at 229 [17] fn 6.

133 *El Hajje* [2002] VSC 286 at [12].

134 [2005] HCATrans 34 at 1880. See joint reasons at [40].

orders of the primary judge. The outstanding questions should therefore be remitted to the Court of Appeal[135].

Orders

97 I therefore agree in the orders proposed in the joint reasons.

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135 cf *Labrador* (2003) 216 CLR 161 at 208 [144], 209 [149].