



Express law fast track information for clients

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The proper subject matter of averments

The High Court in *El Hajje* considered the issue of whether there are constraints on the types of fact which can be averred and in particular, whether the ultimate fact or a fact which, in effect, constitutes an offence can properly be the subject of an averment.¹

CEO of Customs v El Hajje

[2005] HCA 35, 3 August 2005

In this case the CEO of Customs averred in his Statement of Claim that cut tobacco, which was found in the respondent's possession, was manufactured or partly manufactured. The relevant offence alleged to have been committed was a breach of section 117 of the *Excise Act 1901* which provided, at the time, that no person other than a manufacturer shall, except with 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.

The High Court's decision

In a decision delivered on 3 August 2005, five justices of the High Court of Australia held that an averment of the ultimate fact in issue in an Excise prosecution (that the respondent was in possession, custody or control of manufactured or partly manufactured goods) was properly the subject matter of an averment provision, in this case s 144(1) of the *Excise Act 1901*.

The joint majority decision (McHugh, Gummow, Hayne and Heydon JJ) held that there was no warrant for a distinction to be drawn between an averment of an ultimate fact in issue (or *factum probandum*) and other facts by which that fact is proved (or *facta probantia*). Accordingly, the High Court held that the trial judge was not in error in finding that the material in the respondent's possession, custody or control was, as averred in the statement of claim, manufactured or partly manufactured goods, in this case a quantity of cut tobacco.

In the joint judgment their Honours said that:

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. ... None of [the identified crucial] 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 [Excise] Act shows why it could not be averred. [36]

Their Honours went on to say that the distinction drawn by the Victorian Court of Appeal between ultimate facts in issue, on the one hand, and some or all of the factual elements that must be established in the proceeding, on the other, '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.' [37]

Implications of decision

The decision affirms the utility and efficacy of averments in those prosecutions which have the benefit of averment provisions to support them. Properly drawn, so as to aver the essential facts and not the evidence that would be adduced at trial to prove those facts, averments are a legitimate tool available to prosecutorial agencies and their use is not confined or diminished.

The decision clearly and usefully states that the use of averment provisions can not be restricted to certain averred facts and that their continued use as *prima facie* evidence of the facts stated remains unaffected.

Text of the decision is available at:

http://www.austlii.edu.au/au/cases/cth/high_ct/2005/35.html

AGS acted as solicitor for the appellant in this matter.

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Notes

- ¹ Averments provisions allow a statement of fact made by the prosecution to be taken as evidence of this fact unless the defendant produces evidence to the contrary.

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