

16/85

SUPREME COURT OF VICTORIA

TOES v HW GREENHAM & SONS PTY LTD

Marks J

2 December 1984

PRACTICE AND PROCEDURE – LAYING OF INFORMATION – ALLEGED BREACHES OF COMMONWEALTH STATUTE – WHETHER INFORMANT HAS STANDING TO LAY INFORMATION.

When the provisions of s2 of the *Commerce (Trade Descriptions) Act 1905* (Cwth), Part XIV of the *Customs Act 1901* (Cwth) and s13 of the *Crimes Act 1914* (Cwth) are read together, informations are capable of being laid by a veterinary officer of the Department of Primary Industry alleging breaches of s12 of the *Commerce (Trade Descriptions) Act 1905* (Cwth).

MARKS J: [1] This is the return of two orders nisi of Master Brett, April 10 1984, to review dismissals of two Informations by the Magistrates' Court on February 16 1984. The Informations were laid by Michael Toes, a veterinary officer of the Department of Primary Industry, purporting to act in that capacity, against the defendant/respondent for alleged breaches of ss12(a) and (b) of the *Commerce (Trade Descriptions) Act 1905* Commonwealth. [2] The subject matter of the alleged offences is not relevant for a point was taken by counsel for the respondent at the conclusion of opening by counsel for the informant in the court below. I mention in passing that whilst there are two Orders to Review they raise precisely the same point. The procedure requires an order nisi to be taken out in respect of each dismissal. There were two alleged offences, one information in relation to each and the dismissals were made for the same reason. The point taken is a very simple one. Counsel for the respondent/defendant submitted that the applicant/informant had no standing in the proceedings sought to be taken. It was said that s2 of the *Commerce (Trade Descriptions) Act* made that statute incorporated in and to be read in the *Customs Act 1901*. Section 2 reads, "This Act shall be incorporated and read as one with the *Customs Act 1901*".

It was then contended that Part XIV of the *Customs Act*, headed "Customs Prosecutions" – contained the whole code whereby prosecutions of the kind before the Magistrates' Court may be instituted. Then reliance was placed on s245 in Part XIV which provides for proceedings to be instituted by the Minister. The Stipendiary Magistrate upheld the submission and dismissed the Informations. The orders nisi contained two grounds, but counsel for the applicant abandoned the second which related to the order the Stipendiary Magistrate made as to costs. The one ground remaining is as follows:-

That the Magistrate was wrong in law:

(a) in holding that the informant was not entitled to institute the proceedings before the court.

[3] (b) in holding that the prosecution was a Customs Prosecution within s244 of the *Customs Act 1901*.

(c) in holding that he could not convict on the Information where it had not been instituted in accordance with s245 of the *Customs Act 1901*.

(d) in the construction which he placed on ss2 and 12 of the *Commerce (Trade Descriptions) Act 1905*.

(e) in the construction which he placed on ss244 and 245 of the *Customs Act 1901*.

It is necessary to observe at the outset that the offences created by s12 of the *Commerce (Trade Descriptions) Act* are now by virtue of recent amendment indictable offences, but ones which nevertheless by consent may be disposed of summarily. In this case the parties did consent to the summary jurisdiction. But no point is made of that because it was common ground that the offences nevertheless retained their character as indictable offences. It is true, however, that although offences are created by the *Commerce (Trade Descriptions) Act*, no procedure is prescribed in that statute for the institution of proceedings of the kind with which we are here concerned.

It is on that account reference was made to the provisions of the *Customs Act*. I do not doubt the correctness of giving consideration to the provisions of the *Customs Act* as though the *Commerce (Trade Descriptions) Act* is incorporated in and forms part of it. It is for this reason that reliance was placed on the provisions of Part XIV of the *Customs Act*.

In order to determine the question reference must be made to the words of s244 of the *Customs Act* which are as follows:

"Proceedings by the Customs for the recovery of penalties other than a pecuniary penalty referred to in s243B under this Act or for [4] the condemnation of ships, aircraft or goods seized as forfeited are herein referred to as Customs Prosecutions."

It was the next section which was relied on by counsel for the respondent/defendant. Section 245 in so far as relevant reads:

"Customs prosecutions may be instituted in the name of the Minister by action information or other appropriate proceedings—
(a) in the Supreme Court of the State. (b) ... (c) ..."

Apart from any argument as to whether the word "may" in the context is to be regarded as permissive or mandatory, the first answer provided by Mr Walters on behalf of the informant/applicant is that these sections and the whole part only apply to "Customs Prosecutions" within the meaning of the Act. In order to discover that meaning recourse must be had to the definition of the *Customs Act* in s4(1) where the following appears: "The customs' means the Department of Business and Consumer Affairs." Now, it is common ground that the Informations instituted in the Magistrates' Court were not instituted by and therefore not proceedings by the Department of Business and Consumer Affairs, but by an officer of the Department of Primary Industries. At first sight it would seem that this answer is in itself unanswerable. But Mr Crossley of Queen's Counsel for the respondent, ever resilient and ready to meet the challenge, has submitted the following. The provisions in Part XIV of the *Customs Act*, he contended, constitute a sole or exclusive code whereby prosecutions for offences under the [5] Act read as a whole, and the Act read as a whole by virtue of s2 of the *Commerce (Trade Descriptions) Act* must be considered to include that Act. Accordingly, he says that the provisions of s13 of the *Crimes Act* 1914 (Commonwealth) do not apply because a contrary intention appears in the *Customs Act* so understood.

In order to follow this argument it is necessary to have recourse to the words of the said s13 which are:

"Unless the contrary intention appears in the Act or Regulations creating the offence, any person may—
(a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or

(b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction."

Section 13 is, of course, called in aid by Mr Walters on behalf of the applicant/informant. He contends that although there is no specific provision in either statute as to the procedure for Institution of a prosecution under s12 of the *Commerce (Trade Descriptions) Act*, nor any specific provision as to whom may prosecute, s13 of the *Crimes Act* 1914 makes it clear that the prosecution was capable of being launched as it was by the present applicant/informant. It remains, therefore, for me to deal with the argument of Mr Crossley that a contrary intention appears in the *Customs Act*, that is to say an intention appearing in the *Customs Act* that an applicant/informant cannot be an informant, as he was here. I find it difficult to understand where it is said that the contrary intention is manifest. The mere fact that there exists in Part XIV a code whereby "customs prosecutions" within the meaning of that Part is prescribed [6] cannot, in my view, constitute a manifestation of an intention that their prosecutions by an officer of a different department under an incorporated Act cannot be instituted. The fact is that Part XIV merely concerns itself with prosecutions or proceedings by the Department of Business and Consumer Affairs and the present were not of that description.

This was a proceeding or prosecution instituted by a person from an entirely different

department. It is to be noted that there is nothing in Part XIV of the *Customs Act* or elsewhere which suggests that the proceedings to which it refers are the only ones which may be instituted under the Act or any incorporated statute. The words of s244 are clear and unambiguous. They refer merely to proceedings by the particular department to which I have referred. There is nothing in Part XIV which can be said to manifest an intention that prosecution or institution of proceedings by some other person is prohibited. Mr Crossley conceded his argument required interpretation of the two statutes to mean that no prosecution for a breach of s12 of the *Commerce (Trade Descriptions) Act* can be launched by anyone except the Department of Business and Consumer Affairs. In my view there is no call for such an interpretation. It is my view, therefore, by virtue of s12 *Crimes Act* 1914 (Commonwealth) the informations were capable of being laid by the applicant/informant and they should not have been dismissed for that reason.
