Winter case law update

June 2017

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Cases

1. Vestas – Australian Wind Technologies – TCOs
2. Consol Alliance v RL Felton – freight charges
3. DFS Australia – Drawback
4. National Oilwell – TCOs
5. Halifax Vogel Group – TCOs
6. ITW Australia - Bylaws
7. Steelforce Trading Pty Ltd - Dumping

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Vestas-Australian Wind Technology

- Vestas applied for gear boxes for wind turbines
- Customs didn't originally publish the application as it was aware of the local manufacturer
- Vestas applied to the AAT, as such Customs had to gazette the application
- Vestas objected to the TCO and Customs upheld the objection
- Vestas appealed and the AAT agreed that the TCO should be made
- Customs appealed to the Federal Court
- The Federal Court agreed and asked the AAT to reconsider the evidence taking into account certain questions

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Key issues

Was Hofmann an Australia manufacturer of substitutable goods?

This took into account:

- What were substitutable goods
- Were the goods made to order capital goods
- Had Hofmann made goods requiring the same labour skills, technology and design expertise in the past 2 years
- Could Hofmann produce substitutable goods with existing facilities
- Was Hofmann a producer

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What were substitutable goods

- Confirmed that no regard can be had to commercial realities
- The test was whether the corresponding use was a reasonable one
- Very narrow view taken on the potential uses of the TCO goods
- Not merely a gearbox for conversion of torque to produce power
- Only use was specific to use in a wind turbine
- This greatly limited the range of substitutable goods
- Goal for future TCO applicants – narrow the uses if the goods

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Made to order capital goods

- The different test for “produced in Australia” applies to made to order capital equipment. This is defined as:
  - Capital equipment in Australia on a one off basis to meet a specific order rather than being the subject of regular or intermittent production; or
  - That is not produced in quantities indicative of a production run
- Finding – the gearboxes would not have been made to order capital equipment
- Took into account the orders that would have been placed by Vestas – 1-12 a year

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Had Hofmann made goods with the same skills etc

- Tribunal very strict on this point
- Found the test was not satisfied
- Rejected Customs' witness
- Hofmann had primarily repaired gearboxes or made different types of gearboxes
- Decision on this point flowed from the substitutable goods finding

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Producing the goods with existing facilities

- Held that substitutable goods could not be produced in Australia
- There were not facilities to fully test a 3MW gearbox
- This meant the potential use was theoretical – this was no enough

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Hofmann as a producer

- There was not enough evidence to prove to the AAT that:
  - The 25% local content test would have been met
  - Hofmann would have undertaken a substantial process in the manufacture of the goods in Australia

- This was a case of Customs assuming that the AAT would simply accept the claims of the manufacturer on these points – the AAT did not

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Next

- Appeal due by 28 June
- Hard case to win on appeal
- 25% test now gone
- Made to order test now amended
- Use language of “use” as a guide when drafting new TCOs

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ITW Australia and C-G of Customs

Facts

- ITW imported PET resin to manufacture plastic strapping
- Duty underpaid at the time of entry due to use of a TCO
- Voluntary disclosure in May 2012
- Proposed solution – re-enter the goods under a bylaw that applied to:

  "…goods classified under 3907.60.00, 3907.70.00, 3907.9 or 3908 … being polyamides and polyesters, uncompounded, for use in the manufacture of fibres or yarns, UNDER SECURITY"

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Facts continued

- Compliance action in November 2014
- Since time of entry business sold to Signode
- Smallest product produced was 6 mm wide

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Findings

- Products produced from the imported good were plastic strapping – not yarn
- The smallest product at 6mm could not be described as a fibre
- The terms fibre and yarn should be interpreted by reference to the textile industry
- Did not have to consider the issue of whether the goods could be retrospectively entered under security

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Interesting points

- Time between voluntary disclosure and compliance action
- Always harder trying to make fortuitous use of the concession
- Purchase of business – Customs due diligence
- Retrospective use of by-laws – Defensive as opposed to seeking a refund

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Halifax Vogel Group and C-G of Customs

Challenge of a decision to revoke a TCO

TCO made in 2005, revocation application in 2015

The only argument at the hearing was whether the local goods met the manufactured in Australia test

Importer claimed the 25% test was not met

The evidence was not revealed at trial, but the AAT was satisfied that the 25% test was clearly met

Revocation decision upheld

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Interesting points

Referenced the purpose of the TCO system:

"…to ensure that industry is not taxed by the tariff where it is serving no protective function"

How often is this reflected in the approach to making TCOs or interpreting them?

25% test has now been removed – will there be an increase in revocation applications

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National Oilwell Pty Ltd v C-G of Customs

- Review of decision to reject refund applications
- Goods described as “pony rods”
- 11 Feb 2009 TCO keyed to 8413.91.10
- 25 February 2009 TCO rekeyed to 8413.91.90
- Jan 2014 a TA to the applicant provided that the imported goods were classified to 8413.91.10 (would otherwise have qualified for the TCO)
- April 2014 TCO revoked and a new TCO with an operative date of 15 April 2014 keyed to 8413.91.10
- The new TCO was used for future imports after April 2014
- The case concerned refunds for entries prior to April 2014

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Findings

For goods prior to 15 April 2014 the application tried to classify the goods as 8413.91.90 and argued the old TCO was applicable

The Applicant accepted the correct classification was 8413.91.10 but argued pre April 2014 goods should be classified to 8412.91.90 accord to the classification process at the time

Tribunal held that the Customs administrative practice was not relevant to the correct tariff classification of the goods

Applicant not entitled to a refund

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Issues

What to do with TCOs that were incorrectly classified

- New TCO with correct classified apply from the date of the original
- This is not Customs practice
- Seems most fair:
  - previous uses can amend the classification and use the TCO; or
  - Customs could elect not to recover duty in respect of TCOs correctly used at the time of entry
- Having a new TCO apply only from the date the error was identified means every use of the old TCO is incorrect
- Need to allow TA's when obtaining a TCO

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DFS Australia Pty Ltd v the C-G of Customs

- Appeal to the Federal Court on eligibility to claim a drawback of duty
- Drawback refused as DFS was not considered to be the “legal owner” of the goods at the time they were exported
- Concerned “off airport” outward duty free shops – locals paid duty, travellers were charged a duty free price
- DFS paid duty at the time of entry (watches, sunglasses, clothing) – alcohol and tobacco it imported into a bonded warehouse
- On sale goods placed in a tamper proof bag
- Customers agree not to open the goods prior to export and to export them within 30 days

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Statutory test

Many elements of the drawback test – the only one in dispute was whether the claim for drawback was made by the person who was the legal owner of the goods at the time of export.

Reference to “legal owner” is different to the term “owner” which is defined in the Customs Act

The Court held that the term “legal owner” was deliberate and limited drawback claimants to those who had legal title to the property

An equitable ownership right or interest is not sufficient

Found legal title had passed to the customer on the sale of the goods

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Discussion points

- Where ownership is changing the Tradex Scheme may be more appropriate
- Is it fair drawback is limited to the “legal owner” will the obligation to pay duty falls on any “owner”
- It is crucial that clients understand the customs implications of a business plan
- If the business plan only makes sense if no duty is payable, then get a ruling to confirm this
- Are you clients claiming drawback – are they the owner at the time of export – check the contract – when does title pass

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Consol Alliance v RL Felton & Associates

- Dispute as to freight payable
- Consol was a consolidator and RL a FF and customs broker
- Goods to be transported were warming cabinets
- RL sought a quote to transport 12 cabinets with the following dimensions “W100cm x l80cm x H220cm”
- The price agreed was $1 per KG “all in” (airfreight)
- When goods arrived for shipment there was a sticker on each cabinet saying they had to be stored upright
- Consol had assumed the goods could be laid flat - if upright the new rate would be $2.80 by KG
- Without agreement on price, Consol moved the goods

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Outcome

- Consol was bound by its original quote
- RL had acted to its detriment based on that quote

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Discussion points

- If your quote is conditional – make sure you communicate the condition
- Your T&Cs can help you - would have given the consolidator the right to refuse to carry the goods
- If you rely on a price and it is then change – you may have a claim for misrepresentation
- Better to have a hard problem than hope a problem will go away

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Questions

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