



# Customs Compliance Update

# Outline

TCO Caselaw

Dumping duty caselaw

Goods Compliance Update



TCO caselaw

# Syngenta Australia v CG of Customs

- March 2023 AAT case
- Concerns a dispute about whether a tariff concession order should be made

Relevant TCO:

*“HERBICIDES, Group G<sup>[4]</sup>, having an active ingredient of fomesafen sodium.”*

Issues:

- Generic description of goods
- Produced in Australia
- Substitutable goods

# TCO Background

A TCO is a concession that permits duty free entry of the goods named in the concession. It is made on application by an importer, and once made, it is public and any importer can use it. There are approximately 15,000 TCOs in existence.

The test for the making of a TCO is that on the day on which the application is lodged, the application satisfies the “core criteria”. The “core criteria: is that no substitutable goods were produced in Australia in the ordinary course of business. The test is between the goods described in the TCO and the goods produced in Australia.

A good is defined as being substitutable if the good can be put, or is capable of being put, to a use that corresponds with a use (including a design use) to which the goods the subject of the TCO can be put.

A close-up photograph of green wheat stalks, showing the grain heads and long awns, set against a blurred background of more wheat. The image is positioned on the left side of the slide.

# Brief background

- Applicant imported a herbicide which could be used to control a range of broadleaf weeds when applied prior to sowing or post sowing pre-emergence in a variety of crops – it is absorbed via the roots rather than the foliage
- Local manufacturer claimed to produce a variety of herbicides that also worked on a variety of broadleaf weeds
- Customs rejected the TCO application as it found that the local products were effective in killing or controlling at least some of the same weeds as those controlled by the TCO goods
- It did not matter that the TCO goods and the local goods did not work on all the same weeds, in all the same ways in all the same crops




# Generic description of goods

- It is a requirement that a TCO be described in generic terms
- Customs argued that the TCO description was not generic as there was only one registered product that fit within the description

AAT finding:

- Even if factually the applicant's goods were the only registered product, this did not mean that the TCO description was not generic
- Any claim that the TCO description is not generic relies on then current factual similarities, not on the actual wording of the TCO
- There is no "singularity" in the description of the goods or who may import the goods
- *"The emphasis of the statutory prohibition in CA1901 section 269SJ(1) is on the content of the TCO description of the goods, rather than on the contemporary factual scope or significance of that description."*



# Were the local goods produced in Australia

The locally made goods must be “produced in Australia”. Goods will be produced in Australia if at least one process in the manufacture of the goods was carried out in Australia.

In respect of the relevant product, a number of steps were undertaken in Australia including:

- Combining of a range of materials in accordance with a commercially sensitive formulation;
- Formulating granulated particles of the blended and processed ingredients;
- Achieving granule size that conformed with the particle size specifications.

The Applicant argued that this process was the mere mixing of goods and that the resulting good was no different from its ingredients.

# Finding – Produced in Australia

The Tribunal found that the “produced in Australia” requirement had been met. In making this finding it held:

- There is no requirement that there be a chemical transformation in the manufacturing process;
- A process that turns ingredients from a non-effective herbicide to an effective herbicide will constitute a substantial process;
- The combination of ingredients meant that the final product was in a form that could be dispersed and used as a herbicide;
- More generally, the process of manipulating material, milling the material and extruding the material fits within the common meaning of the term “manufacture”;
- Whether the step in manufacture was “substantial” involves a comparison of the step with all the steps being undertaken in the entire process of the manufacture of the goods.

# Hard to win on “produced in Australia”

The bar for demonstrating Australian production is low

There is no minimum content requirement

There is no need for a substantial transformation of the raw materials

Practically – it is very hard to get access to the confidential information regarding the production of goods

# Were the local and TCO goods substitutable

The key focus is the uses of the two goods and whether any use of the TCO goods overlaps with a use of the locally produced goods.

The following issues will be irrelevant:

- Whether the two goods compete
- Issues of costs and quality
- Whether all uses of the two goods overlap.

# Substitutability Cont.

Ultimately, the Tribunal accepted evidence that at least one locally produced products had efficacy in relation to the same crop and the same weeds as approved for the proposed TCO goods. This finding was made despite the fact that the TCO goods:

- Were approved for use in some different crops to the locally produced goods;
- Were approved for controlling some different weeds to the locally produced goods;
- May be applied at different times of crop production than the locally produced goods;
- May have superior performance compared to the locally produced goods.

# Some room to argue not substitutable

Two locally produced products were held not be substitutable:

- could not be used at the same stage of crop production as the TCO goods;
- could only be used in pre-emergent foliage and could not be used “in” crops.
- the TCO goods could be used in sown fields. Further the efficacy of the locally produced goods was limited leaf absorption.

While the products could target some overlapping weeds, given the differences in use, this was not enough to establish substitutability. The Tribunal did not believe that there was a “real possibility” of corresponding use.

- substitutability was effectively denied based on how the end task was performed. Both products killed weeds and there was an overlap in which weeds were killed. However, the products were not substitutable based on how, and in what circumstances, the products could kill the same weeds.



Dumping duty  
caselaw

# Tradesman Technology v CG Of Customs

- Applicant imported a variety of metal traffic sign poles
- The poles were cut to a specific length, contained a precise drill pattern and were powder coated yellow
- The goods were originally classified to 7308 as a part of structure and not subject to dumping duty
- On audit the ABF argued that they were classified to 7306 and attracted dumping duty applying to certain hollow structural sections
- The case raised a number of tariff classification and dumping duty issues

1

Did tariff classification affect whether dumping duty was payable

2

If classified to 7306 were the goods subject to dumping duty as “like goods”

3

Was a traffic sign a “structure” as referred to in 7308

## Issues

# Classification and dumping duty

- ADC conducts investigations into goods with certain tariff classifications
- Dumping commodity register lists those classification
- Dumping notice issued by the Minister often list the classifications
- ICS only imposes duty on those classifications

BUT

- In *Solar Juice* it was said in respect of aluminium extrusions that dumping duty is not limited to any classification
- In *Tradesman* Customs originally argued that classification was irrelevant, the dumping duty would apply regardless

# Every dumping notice is different

- The wording in the ADC report and the notice by the Minister was different for the aluminium extrusion dumping duty and the HSS dumping duty
- In the HSS ADC report the ADC said dumping duty only applied to products with a certain classification (not “may include”)
- The Minister expanded the dumping notice to include additional goods – to do this the Minister only added additional classifications
- At trial Customs conceded that dumping would only apply if the goods were classified to heading 7306

# Like Goods

Tradesman argued that even if classified to 7306, the goods were not the goods described in the notice or “like goods”

A dumping notice applies to the goods and “like goods”

“Like goods” are:

*“in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.”*

Tradesman argued that the drilling of the pipes meant that there was no commercial likeness. While the poles were made from HSS, they became a different and bespoke product once drilled and cut

# Like goods cont.

- Customs encouraged the Tribunal to look at the similarities between the imported goods and the HSS, rather than focus on the differences
- *I do not consider that the drilling of holes to meet MRWA's specifications or even that fact that the drilling of the holes renders the goods unusable for any purpose other than road sign posts, causes them to be something other than GUC or like goods. They still fit the technical, dimensional, physical, manufacturing and treatment description of the GUC as set out in Report 177.[25] They still come within the scope of like goods as that term is defined in the Customs Act (see [11] above) noting that "like goods" should not be interpreted in a narrow or restricted fashion: Marine Power see [22(c)] above.*
- Very restrictive finding which may have implications for other cases
- Does not match how the ADC applies the term in its investigations

# Classification 7306 vs 7308

7306 - OTHER TUBES, PIPES AND HOLLOW PROFILES (FOR EXAMPLE, OPEN SEAM OR WELDED, RIVETED OR SIMILARLY CLOSED), OF IRON OR STEEL:

7308 - STRUCTURES (EXCLUDING PREFABRICATED BUILDINGS OF 9406) AND PARTS OF STRUCTURES (FOR EXAMPLE, BRIDGES AND BRIDGE-SECTIONS, LOCK-GATES, TOWERS, LATTICE MASTS, ROOFS, ROOFING FRAMEWORKS, DOORS AND WINDOWS AND THEIR FRAMES AND THRESHOLDS FOR DOORS, SHUTTERS, BALUSTRADES, PILLARS AND COLUMNS), OF IRON OR STEEL; PLATES, RODS, ANGLES, SHAPES, SECTIONS, TUBES AND THE LIKE, PREPARED FOR USE IN STRUCTURES, OF IRON OR STEEL:

# HSEN for 7308

This heading covers complete or incomplete metal structures, as well as parts of structures. For the purpose of this heading, these structures are characterised by the fact that once they are put in position, they generally remain in that position. They are usually made up from bars, rods, tubes, angles, shapes, sections, sheets, plates, wide flats including so-called universal plates, hoop, strip, forgings or castings, by riveting, bolting, welding, etc.

Apart from the structures and parts of structures mentioned in the heading, the heading also includes products such as :

... level-crossing gates and similar barriers; frameworks for greenhouses and forcing frames; large-scale shelving for assembly and permanent installation in shops, workshops, storehouses, etc.; stalls and racks; certain protective barriers for motorways, made from sheet metal or from angles, shapes or sections.

Prepared for use – drilled, bent or notched

# Identification and prepared for use

- Imported goods objectively identified as traffic sign posts as they had a drill pattern, were cut to length and powder coated yellow
- Agreed that the tubes had been prepared for this use
- Issue was whether the constructed traffic sign was a structure
- AAT held that a traffic sign was a structure within 7308
- The heading and the HSEN referred to items that were not houses or buildings
- HSEN specifically referred to road barriers
- No requirement that the structures be complex, but in any event, some traffic signs structures had over 20 components

# End result

Goods classified to heading 7308 and did not attract dumping duty

The dumping duty that was paid was refunded

U shape grab rails agreed by the parties to be classified to 7308 and not attracting duty

Undrilled galvanised circular poles agreed to be classified to 7306 and subject to dumping duty

Narrow definition of “like goods”

Important to treat each dumping notice on its merits – the dumping notice of aluminium extrusions was not the same as for HSS

# Highlights of the Goods Compliance Update



Australian  
**BORDER FORCE**

## **Goods Compliance Update**

Autumn 2023



# Trade Based Money Laundering

What is it – disguising the proceeds of crime and moving funds through the use of trade transactions in an attempt to legitimise their illegal origin

-The purpose of the transaction is not the movement of goods, but the movement of money

-Examples:

- Importing goods at overvalued or undervalued prices
- Exporting goods at overvalued or undervalued prices
- Falsely describing goods
- Higher risk goods – recycled textiles, sugar, cement, precious gemstones, bullion, tobacco, liquor, scrap metals, solar panels, luxury cars, mobile phones and meat products

# Indicators of trade based money laundering

Customer has limited import/export knowledge

Sudden involvement in an area/good

Import does not match the business or the customer seems unfamiliar with the market

Business is only with the one counterparty

Customer pays cash

Payment method seems risky

Customer seeks unusually high levels of confidentiality

Customer has difficulty providing documents – COO, packing list

Goods are delivered before payment is made

# Indicators of trade based money laundering

Figures are in round dollars

Value of goods inconsistent with market or previous transactions

Transport documents cannot be verified

Duplication of information across documents involving different transactions (reference numbers etc)

Obvious alterations

Lack of a trademark

Freight costs do not make sense for the cargo

Packing is inconsistent – perishables not in a refer

Transport route is unusual

Delivery address is a forwarder or 3PL

# What to do

- This is clearly an important area to the ABF
- The ABF mandatory training includes a module on this topic
- Providing clearly false information could result in a compliance response
- You have an obligation to report information you believe is false
- You can only avoid liability for a false statement by the exercise of due diligence
- Borderwatch

# Dumping

- Continued compliance focus
- Use of exemptions:
  - Not the goods subject to measures (GOODS)
  - From an exempt supplier (SUPPLIER)
  - From a country not subject to the measures (COUNTRY)
- If you claim an exemption, you need the evidence to support it. With the GOODS exemption you should hold sufficient IDM (drawings, photos)

The ABF focus is on DUE DILLIGENCE

# Piggybacking

- Refers to misuse of identity
- Extra attention should be paid to verifying the following clients:
  - First time clients
  - Clients who are also the ultimate consignee (I would be more worried if they were not!)
  - Industry rumours/information about illegal activity involving particular shipments and goods
  - The nature of the consignee's business is inconsistent with the goods described
  - Inconsistent cargo value with freight costs and goods description
  - Companies using web-based or encrypted email addresses
  - Contact by mobile number or email only with no landline number provided
  - Client not providing all information or documentation in order to avoid identification

Clients should periodically obtain customs data and ensure that they are aware of all shipments under their name/ABN

# Other issues

- Electric Bikes – not to be classified as bicycles – should be classified as a motorcycle – key differentiating feature – a motor and a battery to power the motor
- Delivery address – should be the address where the goods are finally destined, not a freight forwarder if the final deliver address is known
- INCOTERMS – is it really FOB
- LCL cargo reporting – need to report the ultimate recipient and the actual overseas supplier
- Underbond movements – goods can only be stored at the warehouse/depot named in the UBMR – they cannot be stored at other depots, transit yards, an agent's office
- Penalty unit increase to \$275 – Infringement notice - \$12,375

# Trusted Trader Getting Stricter

- Transformed from the implementation stage to sustainment stage
- Focus on ongoing assurance and ensuring the integrity of the program
- Trusted Traders are facing re-accreditation
- Over the last 6 years:
  - 700 entities have withdrawn an AAT application
  - 30 have been refused AAT accreditation
  - 37 have had their accreditation terminated

# How many competitors do you have

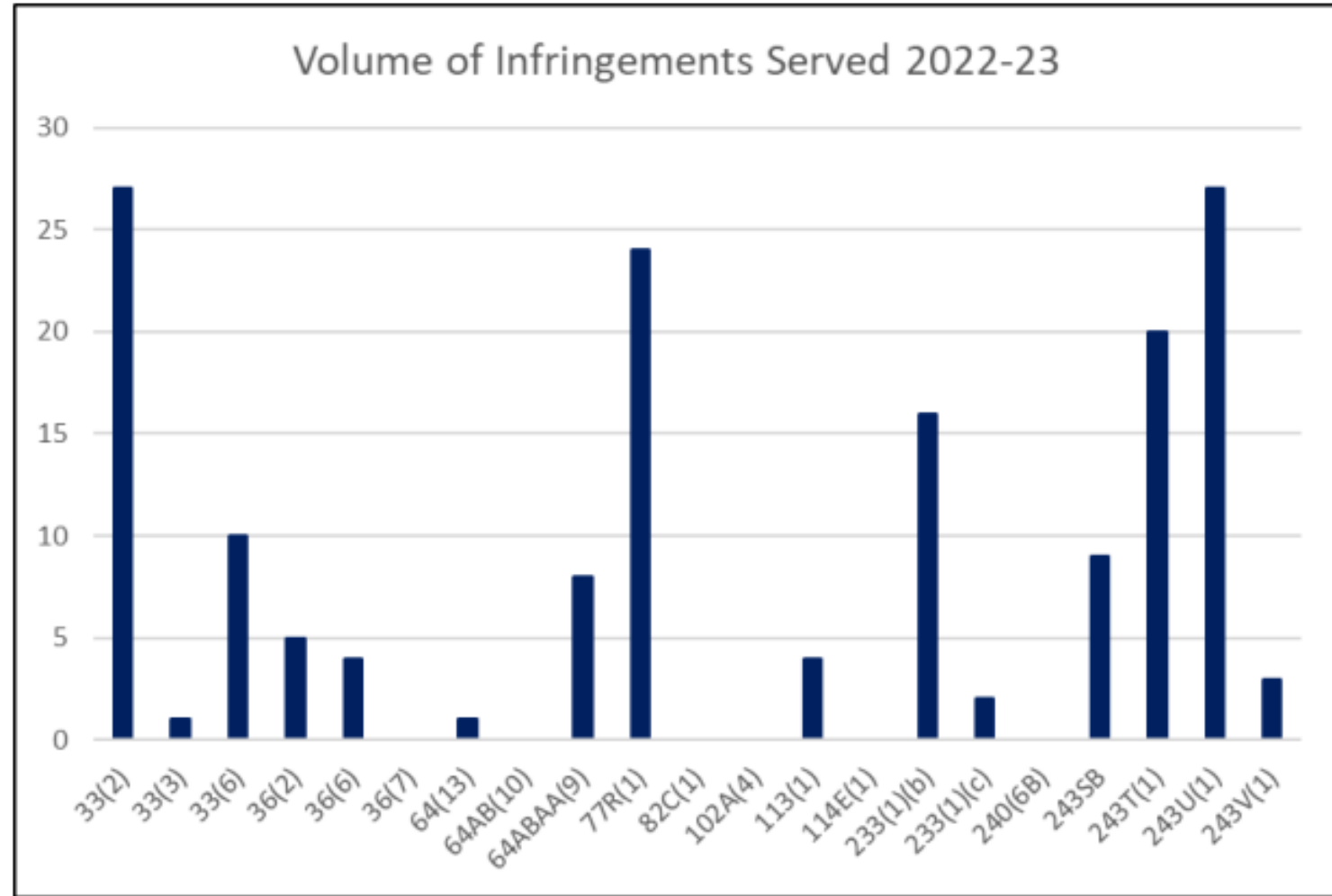
## Licensing statistics

Licence Type	Number
Nominee Customs Broker	1609
Sole Trader Customs Broker	13
Corporate Customs Broker	443
S77G Depot	439
S79 Warehouse (ABF)	159
S79 Warehouse (ATO)	331

*Note: Figures as of 24M AR2023*

# Compliance program results – 2020/21

Figure 1 - Number of Infringement Notice Scheme offences 1 Jul 2022 - 31 Mar 2023



# Dumping duty

**Table 5 - Value of revenue understatements identified from trade remedy investigations and compliance activities, financial year to date (Jul 2022 - Mar 2023) with comparison same period 2021-22 (AUD)**

Trade Remedy Understatements	FYTD 2022/23	FYTD 2021/22
Customs Duty	\$5,834	\$274,020
Dumping Duty	\$2,484,723	\$5,064,646
Countervailing Duty	\$1,373,418	\$1,743,563
GST	\$584,291	\$805,354
Total	\$4,448,266	\$7,887,584

74 verification YTD compared to 61 in total in 21/22

**Table 6 - CMP import declaration results Quarter 3 (Jan - Mar 2023) and financial year to date (Jul 2022 - Mar 2023) with comparison same period 2021-22 (AUD)**

Description	Q3 JAN-MAR 2022/23	Q3 JAN-MAR 2021/22	FYTD JUL-MAR 2022/23	FYTD JUL-MAR 2021/22
No. of lines checked	1462	1488	4613	4606
No. of lines detected to have errors	423	349	1219	1011
Error Rate	28.9%	23.4%	26.4%	21.9%
No. of Detections	442	428	1352	1329

**Table 7 - Most common errors on import declaration lines (CMP)**

Description	FYTD 2022/23	FYTD 2021/22
Val - Valuation Date	179	138
Other	157	109
Val - Invoice Terms	153	72
Incorrect Delivery Address	139	154
Goods Description	89	69
Tariff Classification	87	96
Val - Price (Invoice Total)	83	100
Val - Related Transaction	57	85
Gross Weight	52	48
Loading Port	43	17

# Import declarations

## Export declarations

Table 8 - CMP export declaration results Quarter 3 (Jan - Mar 2023) and financial year to date (Jul 2022 - Mar 2023) with comparison on same period 2021-22 (AUD)

Description	Q3 JAN-MAR 2022/23	Q3 JAN-MAR 2021/22	FYTD 2022/23	FYTD 2021/22
No. of lines checked	236	37	731	376
No. of lines detected to have errors	86	12	221	164
Error Rate	36.4%	32.4%	30.2%	43.6%
No. of Detections	96	20	257	284

Table 9 - Most common errors on export declaration lines (CMP)

Description	FYTD 2022/23	FYTD 2021/22
FOB Value	107	68
AHECC - Misclassification	27	31
Gross Weight	23	44
Net Quantity	21	40
Other Export Data Inaccuracy	17	13
AHECC - Multi-Lines	14	7
Origin	12	22
Consignee Name	11	12
FOB Currency	7	17
Permit Number	7	5

Export  
declarations



# Questions

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