

With respect to tariff classification, what is the function of the Administrative Appeals Tribunal (AAT) and how does it differ from a court of law, and what forms of evidence can be tendered to either the AAT or Court.

This guideline is neither exhaustive nor definitive.

An Informed Observer:

With respect to tariff classification, it has been established by many decisions of the AAT and the courts that one must be an "informed observer"¹. This recognises that decisions on tariff cannot be made without being informed.

How an observer becomes "informed" is by the evidence². Please refer to the section on evidence for a summary of what that constitutes.

Merit versus Law

The AAT "stands in the decision-maker's shoes" and, as such, makes decisions based on the merits of the evidence before them. This is contrary to a court that makes decisions of law – that is, whether what is before them is lawful.

That being the case, the AAT is not bound by the rules of evidence, but may inform itself on any matter as it thinks appropriate³. What this means is that the AAT can accept evidence that is otherwise inadmissible in court.

Bringing the matter before the AAT

Under Part XVII of the Customs Act, Section 273GA covers the review of decisions. Subsection (2) of that provision deals with disputes referred to in subsection 167(1) where the owner of the goods has, in accordance with that subsection, paid under protest the sum demanded by the Collector.

Section 273GA(2) provides for an application to be made to the Tribunal for review of the decision to make that demand and of any other decision forming part of the process of making, or leading up to the making of, that first-mentioned decision.

Section 167(1) deals with a dispute as to the amount or rate of duty payable. Such is (typically) the case with a disputed classification.

¹ Times Consultants and the Collector

² Chinese Food and Wine Supplies and the Collector

³ AAT Act Section 33

167 Payments under protest

- (1) If any dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff, or under any Customs Tariff or Customs Tariff alteration proposed in the Parliament (not being duty imposed under the *Customs Tariff (Anti-Dumping) Act 1975*), the owner of the goods may pay under protest the sum demanded by the Collector as the duty payable in respect of the goods, and thereupon the sum so paid shall, as against the owner of the goods, be deemed to be the proper duty payable in respect of the goods, unless the contrary is determined in an action brought in pursuance of this section.
- (2) The owner may, within the times limited in this section, bring an action against the Collector, in any Commonwealth or State Court of competent jurisdiction, for the recovery of the whole or any part of the sum so paid.
- (3) If a documentary import entry has been made in respect of goods, a protest under this section is taken to have been made if, and only if, the owner of the goods or the agent of the owner:
- (a) writes on the entry ***Paid under protest***, and
 - (b) adds to the entry a description of the goods to which the protest relates (where the protest does not relate to all the goods covered by the entry) and a statement of the grounds on which the protest is made; and
 - (c) signs the statement.
- (3A) If an electronic import entry has been made in respect of goods, a protest under this section is taken to have been made if, and only if, the person making the entry sends to Customs at the time of making payment in respect of the goods following an import declaration advice or a periodic declaration:
- (a) the number given by Customs to identify the relevant import declaration or periodic declaration; and
 - (b) the words ***Paid under protest***, and
 - (c) a description of the goods to which the protest relates (where the protest does not relate to all the goods covered by the import declaration or periodic declaration) and a statement of the grounds on which the protest is made.
- (4) No action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods, unless the payment is made under protest in pursuance of this section and the action is commenced within the following times:
- (a) In case the sum is paid as the duty payable under any Customs Tariff, within 6 months after the date of the payment; or
 - (b) In case the sum is paid as the duty payable under a Customs Tariff or Customs Tariff alteration proposed in the Parliament, within 6 months after the Act, by which the Customs Tariff or Customs Tariff alteration proposed in the Parliament is made law, is assented to.
- (5) Nothing in this section shall affect any rights or powers under section 163.

How bringing the matter before the AAT may vary from bringing an action concerning a TCO before the AAT

To bring about an action concerning classification relies upon Section 273GA(2) and Section 167(1) as such a dispute is one concerning the amount or rate of duty payable. However, when a dispute arises concerning a TCO – either a decision not to grant a TCO, to grant a TCO or to revoke or not revoke a TCO (for example), the dispute is not concerning the amount or rate of duty payable but rather whether the TCO application met the core criteria (for example).

Such a dispute may impact the amount or rate of duty payable, however the amount or rate of duty payable is secondary to the actual dispute.

That being the case one cannot bring about an action before the AAT on a matter of dispute concerning a TCO via Section 273GA(2) and Section 167(1).

Such a dispute must first be appealed to Customs via provisions contained within Section 269 of the Act. This is a statutory precursor to any action being brought to the AAT.

Should an action before the AAT be necessary, it will then be brought about under the provisions of Section 273GA(1).

What circumstances must exist for either a matter of tariff classification or TCO to be appealed from the AAT to a court

As the AAT “stands in the decision-maker’s shoes” and makes decisions based on the merits of the evidence before them without being bound by the rules of evidence, any appeal to a court that makes decisions of law where such rules of evidence are imposed must be based on an error of law.

Evidence

Extrinsic Evidence:

Section 15AB of the Acts Interpretations Act provides for the use of material, other than the primary legislation, to assist in the interpretation of the primary legislation. This other material is referred to as extrinsic material.

Essentially, all material evidence tendered is extrinsic.

Without the existence of Section 15AB no other evidence other than the legislation itself would be able to be used in interpreting the law.

Extrinsic Evidence Restrictions:

Extrinsic evidence is only allowed to be produced in restricted circumstances. Where those circumstances do not exist, the evidence will not be permitted to be used.

The permissible circumstances are:

1. To confirm that the meaning of the legislation is the ordinary meaning;
or
2. To determine the meaning when the legislation provides an ambiguous or absurd result.

Extrinsic material cannot be used to create an ambiguity or to change the result or an otherwise acceptable meaning.

Dictionaries:

In understanding a basic principal of Section 15AB - to confirm that the meaning of the legislation is the ordinary meaning – it is clear that a dictionary is a most common form of evidence.

The use of dictionaries is not restricted to language dictionaries per se, but extends to technical and scientific dictionaries⁴

HSEN:

The Harmonised System Explanatory Notes place an interpretation on Australian legislation that is governed by foreign opinion and, as such, has limited application as evidence.

⁴ Sterns Playland and the Collector

Customs Manuals and Publications:

Customs Manuals, and other publications such as A.C.N.'s provide in the most part, guidance on the Customs viewpoint of the matters contained. They do not have any legislative force and are rarely tendered as evidence.

Tariff Advice Decisions:

Much as Customs Manuals, Tariff Advice decisions contain guidance on the Customs viewpoint of the matters contained and are not legally binding. This fact has been recognised by the AAT⁵.

Trade Evidence:

Trade evidence is normally associated with establishing that the ordinary meaning of a word or phrase – the normal way of approaching a matter of interpretation – is not appropriate in the matter being considered.

Marketing and Labelling Evidence:

How goods are marketed and put-up for sale has been seen, at times, to be relevant, but of little value⁶.

Expert Evidence:

The ability of, and the need for, expert evidence has been acknowledged by the courts⁷. Such an "expert" need not necessarily have high academic credentials, with courts often preferring hands-on experience over academia⁸.

IDM Evidence:

IDM is a catch-all for a variety of material ranging from technical through specifications to sales and advertising and is tendered as evidence regularly and accepted as such.

The matter to then consider is the weight of significance to attach to the IDM in each case, the more the material is based on quantifiable fact the more weight that is likely to be attached to it.

⁵ Blackwood Hodge and the Collector

⁶ Gissing and the Collector; Toyworld and the Collector.

⁷ Clarke v Ryan

⁸ Weal v Bottom