Federal Court of Australia - Full Court

Alstom Transport Australia Pty Ltd v Comptroller-General of Customs [2020] FCAFC 43 (17 March 2020)

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FEDERAL COURT OF AUSTRALIA

Alstom Transport Australia Pty Ltd v Comptroller-General of Customs [2020] FCAFC 43

Appeal from:	*Alstom Transport Australia Pty Ltd and Comptroller-General of Customs* [2019] AATA 1308
File number:	NSD 1107 of 2019
Judges:	DAVIES, MARKOVIC AND STEWARD JJ
Date of judgment:	17 March 2020
Catchwords:	TAXATION – customs and excise – tariff concession order ("TCO") – co criteria – substitutable goods – appeal from decision of the Administrative Appeals Tribunal – where TCO application made in respect of unattended trains to be incorporated into the Sydney Metr Train Network was refused – whether Tribunal erred in applying ss. 269B and 269C of the *Customs Act 1901* (Cth.) – whether Tribunal erre in finding that particular trains produced in Australia are "substitutab goods" in respect of the applicant's trains – whether Tribunal misunderstood its statutory task and failed to make necessary finding of fact – whether Tribunal failed to make findings with respect to the uses to which the particular trains described in the TCO application a the putative "substitutable goods" can be put – whether Tribunal addressed the question of use at an impermissible level of generality
Legislation:	*Customs Act 1901* (Cth.) ss. 269B, 269C, 269F, 269FA, 269H, 269HA, 26 269SJ Explanatory Memorandum, *Customs Amendment Bill 1996* (Cth.)
Cases cited:	*Chief Executive Officer of Customs v. Toyota Material Handling Austra Pty Ltd* [2012] FCAFC 78; (2012) 203 F.C.R. 129

Colorado Group Ltd v. Strandbags Group Pty Ltd [2007] FCAFC 184; (2007) 164 F.C.R. 506
Nufarm Australia Ltd v. Dow AgroSciences Australia Ltd (No 2) [2011] FCA 757; (2011) 123 A.L.D. 21
Re Bag & Jute Co (Tamworth) Pty Ltd and Comptroller-General of Customs and Southcorp Australia Pty Ltd (1995) 38 A.L.D. 357
Re Downer EDI Rail Pty Ltd and Chief Executive Officer of Customs [2010] AATA 866; (2010) 118 A.L.D. 454
Re Thirco Pty Ltd and Comptroller of Customs (1994) 35 A.L.D. 665
Re Vulcan Australia Pty Ltd and Comptroller-General of Customs [199
AATA 150; (1994) 34 A.L.D. 773

Date of hearing:	24 February 2020
Registry:	New South Wales
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	57
Counsel for the Applicant:	Mr I. G. B. Roberts SC with Ms J. Wright
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Solicitor for the Respondent:	Mr S. Lloyd SC with Ms H. Younan
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 1107 of 2(

BETWEEN:	ALSTOM TRANSPORT AUSTRALIA PTY LTD
	Applicant
AND:	COMPTROLLER-GENERAL OF CUSTOMS
	Respondent
JUDGES:	DAVIES, MARKOVIC AND STEWARD JJ
DATE OF ORDER:	17 MARCH 2020

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Administrative Appeals Tribunal dated 17 June 2019 be set aside.
3. The matter be remitted to the Tribunal for re-determination according to law.
4. The respondent pay the applicant's costs of and incidental to this appeal, to be taxed in default of agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. This is an appeal from a decision of the Administrative Appeals Tribunal (the "Tribunal") which had affirmed a decision of the respondent (the "Comptroller") to refuse an application made by the applicant for a tariff concession order ("TCO") pursuant to s. 269P of the *Customs Act 1901* (Cth.) (the "Act') (also first affirmed internally pursuant to s. 269SH(4) of the Act). This appeal turns upon a narrow issue concerning the Tribunal's application of s. 269C of the Act, and the definition of the term "substitutable goods" set out in s. 269B of the Act.

Applicable Provisions

2. In simple terms, a TCO permits identified goods to be imported free from duty in specified circumstances.
3. Section 269P of the Act permits the Comptroller to make, in general terms, a TCO if the Comptroller is "satisfied" that the TCO application "meets the core criteria". That provision provides:

> The making of a standard TCO
>
> (1) If a TCO application in respect of goods, other than goods sent out of Australia for repair, has been accepted as a valid application under section 269H, the Comptroller-General of Customs must decide, not later than 150 days after the gazettal day, whether or not he or she is satisfied, having regard to:
>
> > (a) the application; and
> >
> > (b) all submissions lodged with the Comptroller-General of Customs before the last day for submissions; and
> >
> > (c) all information supplied and documents and material produced to the Comptroller-General of Customs in accordance with a notice under subsection 269M(4); and
> >
> > (d) any inquiries made by the Comptroller-General of Customs;
> >
> > that the application meets the core criteria.

> (2) If the Comptroller-General of Customs fails to make a decision under subsection (1) in respect of a TCO application within 150 days after the gazettal day, the Comptroller-General of Customs is taken, for the purposes of subsection (1), at the end of that period, to have made a decision that he or she is not satisfied that the application meets the core criteria.
>
> (3) If the Comptroller-General of Customs is satisfied that the application meets the core criteria, he or she must make a written order declaring that the goods the subject of the TCO application are goods to which a prescribed item specified in the order applies.
>
> (4) The TCO must include:
>
> > (a) a description of the goods the subject of the order including a reference to the Customs tariff classification that, in the opinion of the Comptroller-General of Customs, applies to the goods; and
> >
> > (b) a statement of the day on which the TCO is to be taken to have come into force; and
> >
> > (c) if subsection 269SA(1) applies in relation to the TCO—a statement of the day on which it ceases to be in force.

4. Section 269C of the Act sets out the "core criteria" as follows:

> Interpretation—core criteria
>
> For the purposes of this Part, a TCO application is taken to meet the core criteria if, on the day on which the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business.

5. The term "substitutable goods" is defined in s. 269B(1) of the Act as follows:

> *substitutable goods*, in respect of goods the subject of a TCO application or of a TCO, means goods produced in Australia that are put, or are capable of being put, to a use that corresponds with a use (including a design use) to which the goods the subject of the application or of the TCO can be put.

6. The following additional provisions are relevant to determining what is, and what is not, a "substitutable good". *First*, s. 269B(3) of the Act provides:

> In determining whether goods produced in Australia are put, or are capable of being put, to a use corresponding to a use to which goods the subject of a TCO, or of an application for a TCO, can be put, it is irrelevant whether or not the first mentioned goods compete with the second mentioned goods in any market.

7. *Secondly*, s. 269F describes how an applicant is to make a TCO application. It provides:

Making a TCO application

(1) A person may apply to the Comptroller-General of Customs for a tariff concession order in respect of goods.

(2) An application must:

(a) be in writing; and

(b) be in an approved form; and

(c) contain such information as the form requires; and

(d) be signed in the manner indicated in the form.

(3) Without limiting the generality of paragraph (2)(c), a TCO application must contain:

(a) a full description of the goods to which the application relates; and

(b) a statement of the tariff classification that, in the opinion of the applicant, applies to the goods; and

(c) if the applicant is not proposing to make use of the TCO to import the goods to which the application relates into Australia on the applicant's own behalf—the identity of the importer for whom the applicant is acting; and

(d) particulars of all the inquiries made by the applicant (including inquiries made of prescribed organisations) to assist in establishing that there were reasonable grounds for believing that, on the day on which the application was lodged, there were no producers in Australia of substitutable goods.

(4) A TCO application may be lodged:

(a) by leaving it at a place that has been allocated for lodgement of TCO applications by notice published on the Department's website; or

(b) by posting it by prepaid post to a postal address specified in the approved form; or

(c) by sending it by fax to a fax number specified in the approved form;

and the application is taken to have been lodged when the

application, or a fax of the application, is first received by an officer of Customs.

(5) The day on which an application is taken to have been lodged must be recorded on the application

8. *Thirdly*, relevant to the power to grant a TCO, and the form of an application for such a concession, are s. 269SJ(1) and (1A) of the Act, which provide as follows:

TCOs not to apply to goods described by reference to their end use or certain goods

(1) The Comptroller-General of Customs must not make a TCO in respect of goods:

(aa) described in terms other than generic terms; or

(a) described in terms of their intended end use; or

(b) declared by the regulations to be goods to which a TCO should not extend.

(1A) Without limiting the meaning of the reference in paragraph (1)(aa) to goods described in generic terms, goods are taken not to be so described if their description, either directly or by implication, indicates that they are goods of a particular brand or model, or that a particular part number applies to the goods.

9. Sections 269SJ(1)(aa) and (1A) were inserted into the Act by the *Customs Amendment Act 1996* (Cth.). The Explanatory Memorandum which accompanied the introduction to Parliament of the *Customs Amendment Bill 1996* (Cth.), described these amendments in the following terms:

Items [sic] 32 - Before paragraph 269SJ(1)(a)

This item amends subsection 269SJ(1) to insert a new paragraph (aa) which provides that the [Chief Executive Officer of Customs ("CEO")] must not make a TCO which describes goods in other than generic terms. The amendment, in combination with the clarification proposed in item 33, is intended to prevent TCOs being made which apply to particular products of a manufacturer, *rather than goods of that description generally*.

The current provisions of section 269HA of the Customs Act will allow the CEO to reject an application at any stage of processing if it becomes apparent that goods are described in non-generic terms. Decisions of the CEO under that section of the Customs Act are reviewable by the AAT under existing paragraph 273GA(1)(ma).

Item 33 - After subsection 269SJ(1)

This item inserts new subsection 269SJ(1A) into the Customs Act to provide examples of descriptions of goods which will not be acceptable under new paragraph 269SJ(1)(aa) proposed in item 32. If a description, either directly or by implication, indicates that the goods are of a particular brand or model, or of a

particular part number, it will not be considered to be in generic terms.

For example, a TCO application which describes goods as "starter motors manufactured by XYZ Company" would not be acceptable. An example of an offensive description which by implication indicates that the goods are of a particular brand would be "washing machines of 5kg capacity, having 6 wash cycles chosen by a black and chrome knob, 3 temperature combinations selected by red plastic switches, stainless steel tub with 450 water holes, nylon lint filter which measures 3.5 x 10cm attached to a moulded green plastic frame, etc" would be a description of goods which goes to such specificity as to imply that it can only be a washing machine model ABC of XYZ Company.

(Emphasis added.)

10. *Fourthly*, the Comptroller has a power to screen and if necessary to reject applications for a TCO that do not comply with the Act. Section 269H of the Act provides:

Screening the application

(1) Not later than 28 days after a TCO application is lodged, the Comptroller-General of Customs must:

(a) if he or she is satisfied:

(i) that the application complies with section 269F; and

(ii) that, having regard to the information disclosed in the application and to the particulars of the inquiries made by the applicant, there are reasonable grounds for believing that the applicant has discharged the responsibility referred to in section 269FA; and

(b) if he or she is not aware of any producer in Australia of substitutable goods;

by notice in writing given to the applicant, inform the applicant that the application is accepted as a valid application; and

(c) if he or she is not so satisfied; or

(d) if he or she is aware of such a producer;

by notice in writing given to the applicant, inform the applicant that the application is rejected and of the reasons for the rejection.

(2) If the Comptroller-General of Customs has not, within that period, accepted or rejected the application, this Part has effect as if the Comptroller-General of

> Customs had, immediately before the end of that period, informed the applicant, by notice in writing, that the application is accepted as a valid application.

11. *Fifthly*, s. 269FA provides that it is the responsibility of an applicant for a TCO to establish that there are reasonable grounds for asserting that an application meets the core criteria. The failure to meet this onus will result in the TCO application itself being rejected (s. 269H(1)(a)). In such circumstances any exercise of the power to accept or reject a TCO application pursuant to s. 269P of the Act is never reached. Section 269FA of the Act provides:

> The applicant's obligation
>
> It is the responsibility of an applicant for a TCO to establish, to the satisfaction of the Comptroller-General of Customs, that, on the basis of:
>
> (a) all information that the applicant has, or can reasonably be expected to have; and
>
> (b) all inquiries that the applicant has made, or can reasonably be expected to make;
>
> there are reasonable grounds for asserting that the application meets the core criteria

12. *Sixthly*, the Comptroller has the power to reject applications that do not comply with s. 269SJ. Section 269HA of the Act provides:

> Comptroller-General of Customs may reject a TCO application in relation to goods referred to in section 269SJ
>
> (1) If, at any time during the period starting from the receipt of a TCO application and ending with the making of a TCO, the Comptroller-General of Customs becomes satisfied that the goods to which the application relates are goods in respect of which, under subsection 269SJ(1), the Comptroller-General of Customs is prevented from making a TCO, the Comptroller-General of Customs must:
>
> > (a) reject the application; and
> >
> > (b) by notice in writing given to the applicant, inform the applicant that the application is rejected and of the reason for the rejection.
>
> (2) If, at any time after the publication of a notice in the Gazette under subsection 269K(1), the Comptroller-General of Customs rejects the application to which the notice relates under subsection (1), the Comptroller-General of Customs must, as soon as practicable after rejecting the application, publish a notice in the Gazette stating that the application has been rejected and giving the reason for the rejection.

13. It was not suggested that the TCO application made here did not comply with the requirements of ss. 269F, 269FA or 269SJ of the Act. Nor, would it appear, did the Comptroller exercise any of his powers in s. 269H or s. 269HA to reject the TCO application made here.

The "Goods"

14. The "goods", as restated by agreement and as gazetted, were identified as follows:

> TRAINS, driverless, single deck, including ALL of the following:
>
> (a) six integrated AND interdependent AND electronically interfaced cars including ALL of the following:
>
> (i) two trailer cars;
>
> (ii) two motor cars;
>
> (iii) two motor cars with pantograph,
>
> (b) maximum carrying capacity of NOT less than 1540 passengers;
>
> (c) under-frame mounted driverless train control AND management systems interfaced with ALL of the following:
>
> (i) traction AND braking system;
>
> (ii) door operation system;
>
> (iii) remote train control AND monitoring system,
>
> (d) closed circuit television;
>
> (e) passenger announcement AND information display units with route maps;
>
> (f) roof mounted heating AND ventilation AND air conditioning (HVAC) with a cooling capacity of NOT less than 35 kW per unit AND a heating capacity of NOT less than 10 kW per unit;
>
> (g) maximum speed NOT less than 100 km/h

15. More generally, it would not appear to be in dispute that the applicant's trains, which are to be imported from India, are intended to be supplied to the State of New South Wales and then used as a driverless passenger train in the "Sydney Metro Train Network". In its TCO application, the applicant stated that its trains were to be used "to transport passengers on a high capacity, high frequency, driverless metropolitan train line system". That description of the proposed use of the applicant's trains divides the parties.

16. EDI Downer Pty Ltd ("Downer") manufactures electric passenger trains in Australia, but not driverless trains. It objected to the grant of the TCO. It was said that its trains were "substitutable goods".

The Tribunal's Decision

17. The issue before the Tribunal was whether Downer's trains are "substitutable goods" (as defined). More particularly, the issue was whether Downer's trains are put, or are capable of being put, to a use that corresponds with a use (including a design use) to which the applicant's trains can be put.
18. Because of the approach it took to that issue, it was unnecessary for the Tribunal to make any detailed findings of fact about the applicant's and Downer's respective trains. Indeed, the only fact known about Downer's trains is that they carry passengers and are powered by electricity. That is because the Tribunal accepted the Comptroller's contention that at least one "use" to which the applicant's trains will be put (once imported) is the transportation of passengers by train. Because it was accepted that Downer's trains are also so used, its trains necessarily were "substitutable goods".
19. The Tribunal rejected the applicant's statement of the use to which its trains will be put – "to transport passengers on a high capacity, high frequency, driverless metropolitan train line system" – as too specific. It decided that the "use" in question was the "ultimate use" of the goods. From the perspective of the passengers, whether driven or driverless, passenger trains simply transport passengers. It was said that this description of the proposed use of the applicant's trains was consistent with decisions such as *Re Vulcan Australia Pty Ltd and Comptroller-General of Customs* [1994] AATA 150; (1994) 34 A.L.D. 773 and that of *Chief Executive Officer of Customs v. Toyota Material Handling Australia Pty Ltd* [2012] FCAFC 78; (2012) 203 F.C.R. 129 where the Full Court said that the identified use needed to be "reasonable".
20. The Tribunal recognised that it also needed to distinguish between the use of goods and the means by which that use is achieved: *Re Thirco Pty Ltd and Comptroller of Customs* (1994) 35 A.L.D. 665. It followed that different ways in which a train might transport passengers did not address how a train is or can be used.
21. At [25] of its reasons, the Tribunal referred to the two competing descriptions of the use of the applicant's trains in the following terms:

> It is true that, as the respondent submits, goods within the TCO are used for the transport of passengers by rail. They are of course also capable of being put to that use. The "use" to which the goods are capable of being put, and to which they are put is also, as the applicant submits, the transport of passengers on a driverless metropolitan train line system, or more particularly, to transport passengers on a high capacity, high frequency, driverless metropolitan train line system. The word "use" in the definition of "substitutable goods" is said in the definition section to include a design use to which the goods the subject of the application or the TCO can be put.

22. At [28] of its reasons, the Tribunal decided that it was sufficient for there to be correspondence in respect of only one of the described uses. It said:

> One difference between the two formulations lies in their specificity. Is it enough that one use, of the two mentioned in [25] describes the use of the TCO goods and the putative substitutable goods, even if the other formulated use applies only to the TCO goods? An affirmative answer to that question, on the literal terms of the definition in s.269B, is suggested by the words "a use" in two places in the definition. The transportation of passengers by rail is a use to which both categories of goods is put.

23. At [32]-[33] of its reasons, the Tribunal decided that an application of the "ultimate use" test would favour the Comptroller's position, and that it was accordingly sufficient that the ultimate use of the applicant's trains corresponded with that of Downer's trains. It said:

> The "ultimate use" test advanced in *Vulcan* and adopted in later decisions of the Tribunal would favour the description of use suggested by the respondent. A passenger train is understood as a vehicle for the transportation of persons by rail, and that is a description of the use of both driverless and driven passenger trains. It is what one would understand as their most important use. Questions of frequency and efficiency, such as are raised by the applicant's proposed description of use do not seem to arise as more than selling points, rather than as part of a description of use. No doubt, as society becomes more used to driverless trains, it will no longer occur to people to stress their driverless feature when describing them.
>
> Moreover, as was pointed out in Downer, it is not necessary to find that the use is precisely applicable to both the TCO goods and the putative substitutable goods. Rather, the question is whether the uses correspond. It is arguable that the uses "correspond" even if one considered only the description of use proposed by the applicant.

24. It concluded at [41] of its reasons as follows:

> In the result, I am satisfied that the description of use advanced by the respondent is appropriate to be considered in applying the definition of substitutable goods, and that at the relevant time substitutable goods were manufactured in this country, so that the application for the TCO was correctly refused.

Grounds of Appeal

25. The applicant relied upon the following grounds of appeal:

> (a) that the Tribunal had erred in characterising two separate uses of the applicant's trains (one a broader class of use, with the other being a subset of the other);
>
> (b) that the Tribunal had incorrectly identified an impermissibly broad use of the applicant's trains;
>
> (c) that the Tribunal had incorrectly characterised the driverless elements of the applicant's trains as context or environment or a means of achieving a broader use; and
>
> (d) that, accordingly, the Tribunal had erred in finding that the Downer trains were substitutable goods and that as a result the "core criteria" specified in s. 269C had not been met.

26. The applicant accepted that if it were to succeed on any of these grounds, the matter would need to be remitted to the Tribunal to re-determine the applicant's TCO application in accordance with law.

The Submissions of the Parties

The applicant's submissions

27. The applicant admitted that its grounds of appeal tended to overlap. The nub of its case was that its trains were tailored for the Sydney Metro Train Network and could only be used on that network and not elsewhere. Downer's trains, in contrast, were not "substitutable goods" precisely because they could not be used on that network. This proposition was summarised by the Tribunal at [20] as follows:

> The applicant also submits that the stated and only potential use of the TCO goods is to transport passengers on a high capacity, high frequency, driverless metropolitan train line system. The applicant asserts that no goods having that use were at the relevant date produced in Australia. The applicant also submits that the driverless trains within the TCO description are not capable of any use whatsoever outside the driverless network or system within which they function. They cannot be switched on or even "woken up" by any independent means or device that is external to the system.

28. The applicant criticised the Tribunal's reasoning for what it claimed was an overemphasis on the driverless aspect of its trains. That was only one aspect that made the trains unique. Other aspects included the presence of six integrated, interdependent and electronically interfaced cars, and under-frame mounted driverless train control and management systems which would interface with each train's traction and brake system, door operation system, and remote train control and monitoring system.

29. A central part of the applicant's case was that its trains were categorised as "GOA4" trains for the purposes of International Standard IEC 62290 (the "Standard"). The Court was taken to a chart in that Standard that sets out four grades of train automation. The grades commence at "GOA1", with the trains being less automated, and finish with "GOA4" with these trains being the most automated. It was said that there are no "GOA4" trains in Australia.

30. In general terms, the Standard describes the difference between "GOA4" and "GOA3" trains in the following way:

> In this grade of automation, additional measures are needed compared to GOA3 because there are no onboard operations staff.
>
> Safe departure of the train from the station, including door closing, has to be done automatically.
>
> More specifically, the system supports detection and management of hazardous conditions and emergency situations such as the evacuation of passengers. Some hazardous conditions or emergency situations, such as derailment or the detection of smoke or fire, may require staff interventions.

31. More specifically, and illustrative of what were said to be exceptional features of "GOA4" trains, cl. 6.2.2.5.1 of the Standard states:

> Ensuring safe passenger transfer through the following functions is a mandatory system requirement for GOA4. For lower grades of automation these functions may be in whole or in part the responsibility of the train driver or operations staff on the platform in combination with the system:
>
> control doors,

> prevent injuries to persons between cars or between platform and train,
> ensure starting conditions.

32. The Court was also taken to certain parts of the "Particular Specification" for the applicant's trains to further support their characterisation as distinctive, as contended for by the applicant. The specification appears to make it clear that the trains must comply with "GOA4" requirements as set out in the Standard. The specification also makes it clear that the trains are to be considered as a "total complete system". Clause 10.1.1 thus states:

> The design of the [Trains Management System (the "TMS")] shall consider the Trains as a total complete system and the TMS shall provide a centralised function to control and monitor all its subsystems operation and fault status, fault data logging, incident investigation and reporting.

33. Again, illustrative of the claimed distinctive nature of the applicant's trains, it was said that "GOA4" trains have a door function that is different from "GOA3" trains. The door system was described in the specification as follows (at cl. 10.4.3):

> Door System
>
> The TMS shall provide the following functions:
>
> > (a) Interface with each door control unit to receive door operational monitoring signals and detected faults.
> >
> > (b) Monitor and record the status of the by-pass command.
> >
> > (c) Monitor the health status of each door pair, such as the operating time and the fully closed signal provided by the door proving device.
> >
> > (d) Monitor the status of the manual emergency release device.
> >
> > (e) Monitor the status of the mechanical lock switch and manual door isolation device.
> >
> > (f) Facilitate maintenance adjustment of Trains door operational parameters.
> >
> > (g) Monitor the status of the trainline door commands of open and close.
> >
> > (h) Conflicting logical commands, such as both open and close wires energized, shall be reported to the Trains attendant and the [Operation Control Centre] and logged in the memory.

34. It was said that the reference to the "door operation system" in the description of the goods in the TCO application was to this "door system".
35. The applicant submitted that the Tribunal had erred in really two substantive ways:

> (a) it had failed to make the necessary findings about the applicant's trains which demonstrated their distinctive nature. For example, it had failed to make a finding about whether the applicant's trains could operate on any other rail link in Australia, or whether Downer's trains could operate on the Sydney Metro Train Network; and
>
> (b) it had addressed the question of use at too general a level. Observing that both the applicant's and Downer's trains are used to transport passengers by rail failed to address all of the distinct features of the applicant's trains. When pressed to identify the level of specificity required to assess use, the applicant's Senior Counsel said that one should consider the description of the goods contained in the TCO application, and ask how goods so described can be used.

36. The applicant referred to an earlier decision of this Court in *Toyota Material Handling Australia Pty Ltd*. In that case, the goods in question were forklifts that were directed at the market for lifting loads *above* 5 metres. The goods said to be "substitutable" were driverless forklifts which could lift 1,200 kg goods to a height of five metres, but at that height the forklift would be at "its outside limits". The Court decided that these forklifts were "substitutable goods" because both forklifts could lift loads up to 1,200 kg to a height of five metres. The fact that the applicant's forklifts could lift more than 1,200 kg above five metres was irrelevant. Senior Counsel for the applicant here emphasised the specificity of this comparison. He drew to the Court's attention the following passage (at 130-131 [5]) from the reasons of the Full Court which he said applied to this proceeding:

> What the Tribunal was required to do therefore was to assess the goods the subject of the TCO application for their actual uses or those to which they could reasonably be put and to ask whether any Australian goods were, or could reasonably be, used for any of those purposes.

The Comptroller's submissions

37. The Comptroller disagreed with the applicant's submissions. His Senior Counsel submitted that the fundamental object and purpose of the "core criteria" is the protection of Australian industry. As Deputy President Tamberlin, Q.C. and Senior Member Ettinger said in *Re Downer EDI Rail Pty Ltd and Chief Executive Officer of Customs* [2010] AATA 866; (2010) 118 A.L.D. 454 at 462 [40]:

> ... The purpose of the TCO scheme is to remove the cost of customs duty where the imposition of duty serves no protective function for Australian industry or, in the words of Drummond J in *Seguin Moreau, Australia v Chief Executive Officer of Customs* [1997] FCA 776; (1997) 77 FCR 410 (although the relevant date for his purposes predated the amendment of the core criteria), "the object of Part XVA of the Act continues to be to protect all Australian-made goods from competition of any significance from imported goods". The narrow approach advanced by Downer does not give sufficient effect to this purpose: see second reading speech to the Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992, Senate Hansard 28 May 1992 at pp 2858 and 2859.

38. It was submitted that an importer should not be entitled to concessionary treatment unless there are no "substitutable goods" in Australia. Here, the use identified by the Tribunal was "reasonable" in the context of the function and purpose of the "core criteria". In that respect, the Comptroller's Senior Counsel also submitted that a significant element of the statutory regime was that the grant of a TCO turned upon the Comptroller's state of satisfaction for the purposes of s. 269P. He submitted that the level of specificity was controlled by the Comptroller himself when deciding whether he was or was not satisfied that the applicant met the "core criteria". In doing so, the Comptroller would have regard to the function and purpose of the "core criteria". The Comptroller also placed reliance upon s. 269B(3) (set out above) which states that it is irrelevant whether or not the goods to be imported would compete in any market with the goods said to be "substitutable goods". It followed that a "substitutable good" was not limited to an "interchangeable" good. The test, it was said, was much broader than this.

39. The Comptroller's Senior Counsel said that the Tribunal had assessed use here at the correct level of specificity. It thus did not need to consider, or make findings about, the features of the applicant's trains which make them distinctive. In simple terms, the applicant seeks to import passenger trains, and trains of that kind are presently produced in Australia by Downer. The imposition of duty here would serve to protect *that* industry. Such a consequence could not be avoided, it was submitted, by the importation of a very "bespoke" train, or a train with the latest modern features.

40. The Comptroller's Senior Counsel also referred to a number of authorities of this Court and of the Tribunal which were said to support a comparison of a higher ultimate use of goods for the purposes of s. 269C of the Act. In *Re Vulcan Australia Pty Ltd*, the Tribunal compared two types of portable heaters (one of which used kerosene; the other type used gas or electricity) and decided that both had a corresponding use: both were used to provide domestic space or room heating. The Tribunal decided that the word "use" in the definition of "substitutable goods" should be given its ordinary meaning. It said at 774-775 [44]-[46] as follows:

> Many meanings of the word "use" appear in the dictionaries. That meaning which is relevant in the *Shorter Oxford Dictionary* (3rd ed, 1944, reprinted with corrections 1983) is that of "A purpose, object, or end, esp. of useful or advantageous nature ...". The *Macquarie Dictionary* (1st ed, 1981) defines it, again in so far as it is relevant, as:
>
> > "1. to employ for same purpose; put into service; turn to account: *use a knife to cut, use a new method*. 2. to avail oneself of; apply to one's own purposes: *use the front room for a conference* ..."
>
> What is apparent from both of these definitions is that the focus of the word "use" when used in isolation without reference to a context is upon the end result i.e. the purpose, object or service. It is not upon the means of achieving that purpose, object or service. If the word is intended to encompass those means, it must come from the context in which the word "use" appears. When we look at the context in which the word is used in the Act, we can find nothing which suggests that we should give the word "use" anything other than its ordinary meaning. The definition of substitutable goods refers to "a use (including a design use) to which [TCO] goods ... can be put". Clearly, the definition is not simply confining itself to a use for which the TCO goods were designed but is looking to the use to which they can be put. There seems to be no suggestion in this that the means by which that use is achieved have any relevance at all.
>
> We also note that the definition refers to the goods produced in Australia being

> "put to a use ... that corresponds with a use" to which the TCO goods can be put. Again the emphasis is upon the ultimate use and not the means by which it is achieved and this is not altered by the use of the word "corresponds". That word has been defined, again in so far as it is relevant, in the *Shorter Oxford Dictionary* as:
>
> > "1. To answer to something else in the way of fitness; to agree with; be conformable to; be congruous or in harmony with. 2. To answer to in character or function ..."
>
> and in the *Macquarie Dictionary* as:
>
> > "1. to be in agreement or conformity (oft. fol. by with or to): his words and actions do not correspond. 2. to be similar or analogous; be equivalent in function, position, amount etc ..."
>
> These definitions do focus in part on the function or process but that is not the appropriate focus of the word "correspond" in the definition of "substitutable goods". Reference must be made to the two things which must correspond. Those two things are the use to which the TCO goods can be put and a use of the substitutable goods. The ordinary meaning of "correspond" in that context is that one use conforms with or is in harmony with the other use. It would be reading too much into the words "corresponds with" to say that the function or process of the use of one must conform with or be in harmony with the other. It follows that, we can find no suggestion in the definition that the means by which the goods achieve any such use is of any relevance at all. We consider, therefore, that we should give the word "use" its ordinary meaning.

41. In *Re Bag & Jute Co (Tamworth) Pty Ltd and Comptroller-General of Customs and Southcorp Australia Pty Ltd* (1995) 38 A.L.D. 357, the Tribunal was required to compare bags which carried fertiliser. The bags the subject of the TCO application were chosen for use at a particular factory. The Tribunal accepted that the bags were the only type capable of being used at that facility. Nonetheless, the Tribunal decided that the other bag was a "substitutable good" because both were used to carry fertiliser. The Tribunal reasoned at 360-361 [23]-[26] as follows:

> Although the goods the subject of the proposed TCO's are specifically required for Incitec's automated production line at Gibson Island and no other manufacturer of fertiliser or other bulk products in Australia uses them, and no other type of bag can be used at the automated plant, that is not sufficient to enable the Tribunal to say that there are no substitutable goods produced in Australia.
>
> In *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 104 ALR 633 the full court of the Federal Court discussed the concept of a market and substitutions for the purposes of the Trade Practices Act 1974: see 649 et seq. It there held that the concept of a market for the supply of airline services to persons engaged in packaged tours to the Maldive Islands was too narrow and that the relevant market was to persons engaged in island holiday packages to at least islands in the Pacific and Indian Oceans and South East Asia.

> Following the logic of the above case, it seems to this Tribunal that to limit the class of substitutable goods to polypropylene end valve sacks would be to have regard to a sub-market, an approach which was rejected by the Tribunal in *Re Vulcan* supra. See also *Re Zetco Pty Ltd and Collector of Customs* (AAT, 21 March 1995, V94/165, unreported).
>
> The Tribunal finds therefore that the genus for which substitutable goods should be sought is not woven polypropylene valve sacks but bags for fertiliser and other products, not exceeding 55kg capacity, and that there were goods produced in Australia in the ordinary course of business which were "substitutable goods".

42. In *Nufarm Australia Ltd v. Dow AgroSciences Australia Ltd (No 2)* [2011] FCA 757; (2011) 123 A.L.D. 21, the Federal Court was required to consider two weed killers which killed weeds using different chemicals and means. The Tribunal had earlier decided that because of the different properties of the two weed killers, they did not have a corresponding use. Robertson J. disagreed. His Honour said at 28 [50]:

> In my view the present Tribunal could not reason as it has done to find that the goods were not substitutable goods. Merely to say that one herbicide operates in a different manner to another does not establish that the goods were not substitutable because it leaves open that the goods have a corresponding use, that is, in killing the same weeds in the same crops.

43. In *Re Downer EDI Rail Pty Ltd*, the Tribunal was required to compare a partially completed passenger train (it had no "driver cab module"), with a locally-made passenger train. Downer contended that at the time of importation the train lacked motor power and self-propulsion. As such, it could not at that time be used to carry passengers, and thus had no comparable use with locally-made trains. It was said that the trains were, in effect, like a "body without the brain". It was submitted that the ultimate or intended use of the goods after the completion of their manufacture in Australia was irrelevant.

44. The Tribunal rejected Downer's contentions. It reasoned that the language of the definition of "substitutable goods" was "broad". At 459 [27]-[28], it said:

> Turning first to the language used, the definition of "substitutable goods" contains no reference or requirement to the use the goods the subject of the TCO can *presently or immediately* be put. The reference is rather to uses to which the goods *are* in fact *put* or are *capable of being put* and to a use that *corresponds with* a use to which the goods the subject of the application TCO *can* be put. The word "can" draws attention to the future or potential use or range of uses of the goods of United.
>
> The language of the definition is broad because it refers to uses to which the goods are "capable" of being put. It also refers to a use that "corresponds" with a use which the goods the subject of the application can be put. Furthermore, the reference to the inclusion of a "design use" indicates a broader concept of use than a use to which goods are in fact being put at any particular point in time. Put another way, there is nothing in the definition which limits the use to an immediate or present use at the time of importation.
>
> (Emphasis in original.)

45. The Tribunal decided that although the trains were incomplete, they were capable of use which was "*conformable* to, *congruous* with or *in harmony with* use as a completed passenger train" (at 461 [34]) (emphasis in original). In that respect, the Tribunal held that correspondence for the purpose of the definition of "substitutable goods" did not require the goods in question to be "identical or exactly limited in use or exactly the same use" (at 461 [34]). The Tribunal concluded as follows at 462 [42]:

> Accordingly, in the circumstances of this case and having regard to the evidence as to the nature and characteristics of the TCO goods, and taking into account the need for a purposive approach and to ordinary usage of the expressions used in the definition of "substitutable goods", we are satisfied that the relevant characterisation of the use of the TCO goods is as a passenger train and that the goods manufactured in Australia by United correspond with such a use including a design use to which the imported goods can be put.

The applicant's submissions in reply

46. In his reply, Senior Counsel for the applicant submitted that many of the foregoing cases supported his contention that the definition of "substitutable goods" directs one's attention to the specific use of the goods in question. In *Toyota Material Handling Australia Pty Ltd*, it was lifting goods weighing up to 1,200 kg to a height of five metres. In *Nufarm Australia Ltd*, it was killing the same weeds. In *Vulcan*, it was heating the same space. Here, it was said, necessary findings about the actual proposed use of the applicant's trains, and about the actual or potential use of Downer's trains, had not been made. Thus, a comparison of those actual uses had never been undertaken.

Disposition

47. The uses to which the applicant's trains can be put may be described in various ways. Each of those ways may be seen as a perfectly legitimate statement about the use of the applicant's trains. So, for example, it is correct to say that the trains will be used for transportation, *simpliciter*. It is also true that they will be used to transport passengers. It may also be said that they will be used to transport passengers on rail tracks. And finally, it may also be true, as the applicant contends, that they will be used on the Sydney Metro Train Network "to transport passengers on a high capacity, high frequency, driverless metropolitan train system".

48. However, it may be accepted that the definition of "substitutable goods" is not directed at all of these ways of describing the use of the applicant's trains. For example, describing the applicant's trains as being used for transportation, without more, would cast the genus or class of use too broadly, and potentially deny a concession for the importation of goods which have no real equivalence to goods produced in Australia.

49. In *Toyota Material Handling Australia Pty Ltd*, this Court helpfully said that the definition of "substitutable goods" calls for a comparison to be made as follows (at 130 [4]):

> The comparison required is not only between actualities but also between potentialities. And so far as the potentialities are concerned what it requires is a focus, on the one hand, *on what the goods described in the proposed TCO can be used for* and, on the other, the uses to which the suggested local goods can be put. The comparison which the provision calls for between the potential uses of the TCO goods and the local goods is not one, however, in which any conceivable use will suffice. A spoon may be used to dig a trench but Parliament cannot have intended for a spoon to be substitutable goods for an excavator. *The potential uses to which the definition adverts are, therefore, only reasonable ones*.

(Emphasis added.)

50. But an expression of applicable *discrimen* that would exclude comparisons which are unreasonable only gets one so far in a case such as this. That is because, on one view, the competing ways of describing the use of the applicant's trains here are both reasonable.

51. The Act supplies some answers:

> (a) *first*, we know from s. 269F that the TCO application must contain a "full description of the goods" and must state which tariff classification applies to those goods. In that respect, for a TCO application to be valid, pursuant to s. 269FA it is the applicant's responsibility to demonstrate that there are "reasonable grounds" for asserting that the application meets the "core criteria";
>
> (b) *secondly*, s. 269H gives the Comptroller the power to reject a TCO application if he or she is not satisfied, amongst other things, that the application complies with s. 269F; and
>
> (c) *thirdly*, pursuant to s. 269SJ(1) the Comptroller must not make a TCO in respect of goods which have not been described in "generic terms"; and he or she must not make a TCO for goods described in terms of their intended end use. Section 269SJ(1A) tells one that goods will not be described in "generic terms" if their description indicates, either directly or by implication, that "they are goods of a particular brand or model, or that a particular part number applies to the goods". The Comptroller has a specific power to reject a TCO application if he is satisfied that s. 269SJ(1) applies to prevent him from making the TCO (s. 269HA).

52. The foregoing statutory regime may be seen as one which requires goods to be described fully but generically (or generally, to use the language of the Explanatory Memorandum) in a TCO application and which gives specific powers to the Comptroller to screen and then reject such an application for non-compliance with s. 269F or s. 269SJ. Notably, here, neither power was ever exercised by the Comptroller. Notably also, the regime ascribes great importance to the way goods are to be described in a TCO application and gives the Comptroller power to check and then address unsatisfactory descriptions before he or she ever gets to exercise the power to issue or not issue a TCO pursuant to s. 269P of the Act. All of this supports the primacy of the description of the goods in the TCO application once it has been accepted as valid by the Comptroller.

53. It follows that the Act is concerned with the particular way goods, as described in a TCO application, are to be used. Here, that is not just as any passenger train, but the train described in the application set out above. That conclusion is supported by the passage from *Toyota* (set out above) and from the following passage from Robertson J. in *Nufarm Australia Ltd* at 29 [57]:

> A practical analysis would be:
>
> (i) what are the TCO goods?
>
> (ii) to what use or to what uses are they put or can they be put?

(iii) what are the goods claimed to be substitutable?

(iv) to what use or to what uses are they put or are they capable of being put?

(v) are the uses in (ii) and (iv) or any of them corresponding uses?

54. Here, the Tribunal did not adopt the foregoing process. It did not make findings about the use to which the particular trains described in the TCO application can be put and it did not make findings about the uses to which the Downer trains are put or are capable of being put. Having failed to make these findings, it therefore failed to undertake a determination of whether there were corresponding uses. Moreover, expressing the use of the applicant's goods as being for the transportation of passengers by rail did not address the usages of the applicant's goods, precisely because those goods were never described in the TCO application as passenger trains, without more. The Tribunal, with great respect, accordingly erred. It misunderstood its statutory task and it failed to make the necessary findings of fact.

55. Our conclusion is supported by some observations of Allsop J. (as his Honour then was) in *Colorado Group Ltd v. Strandbags Group Pty Ltd* [2007] FCAFC 184; (2007) 164 F.C.R. 506. This was a trade mark case where the issue was whether certain goods – namely bags, wallets, purses and belts – were "of the same kind" as backpacks for the purposes of the *Trade Marks Act 1995* (Cth.). It was contended that all of these goods were "of the same kind" because they were all simply "receptacles which ordinary people carry around with them every day for transporting things". Allsop J. rejected that contention and said at 530-531 [89]-[90]:

> ... The aim of the enquiry is not to find some broad genus in which some common functional or aesthetic purpose can be identified. Nor is it an enquiry about the type of trade in which concurrent use might cause confusion. Rather, it is identifying, in a practical, common sense way, the true equivalent kind of thing or article. For example, use of a mark on hatchets or small axes, created proprietorship in relation to axes: *Jackson v Napper* 35 Ch D 160. This approach recognises ownership or proprietorship in a mark beyond the very goods on which the mark is used, to goods "though not identical ... yet substantially the same" (Hemming HB, *Sebastian's Law of Trade Marks* (4th Ed) p 91) or "goods essentially the same... though they pass under a different name owing to slight variations in shape and size" (Kerly DM and Underhay FG, *Kerly on Trade Marks* (3rd Ed) p 206). This approach is conformable with the terms of the 1995 Act.
>
> That backpacks are a type or style of bag does not answer the question as to whether they should be viewed as essentially the same goods as any bag or receptacle. The backpack is a bag with straps to be worn on the back. It is not essentially the same or the same kind of thing as other bags, handbags, purses or wallets. The task is not to identify the genus into which the goods upon which the mark was used fall, but to identify the goods.

56. Allsop J.'s observation that the task is not to identify the genus of the goods but the goods themselves is apposite to this appeal. Here, the Tribunal's task is not to identify a broad genus of use but the use of the actual goods described in the TCO application. In our view, the Tribunal erred in not undertaking that task. Whether the uses of the applicant's trains, as properly identified, will correspond with any of the uses of Downer's trains, as properly identified, will be a matter for the Tribunal to determine. It is not a task this Court can undertake because the necessary findings of fact have yet to be made. Upon remittal, it may well be found that the uses to

which the applicant's trains, as described in the TCO application, can be put are those described by the applicant as being "to transport passengers on a high capacity, high frequency, driverless metropolitan train line system".

57. This appeal should be allowed with costs and the matter should be remitted to the Tribunal to be re-determined in accordance with law.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgme herein of the Honourable Justices Davies, Markovic and Steward.

Associate:

Dated: 17 March 2020