Federal Court of Australia - Full Court

Chief Executive Officer of Customs v Toyota Material Handling Australia Pty Ltd [2012] FCAFC 78 (29 May 2012)

Last Updated: **29 May 2012**

FEDERAL COURT OF AUSTRALIA

Chief Executive Officer of Customs v Toyota Material Handling Australia Pty Ltd [2012] FCAFC 78

Citation:	**Chief Executive Officer of Customs v Toyota Material Handling Australia Pty Ltd [2012] FCAFC 78**
Appeal from:	**Toyota Material Handling Australia Pty Ltd v Chief Executive Officer of Customs** [2011] AATA 600
Parties:	**CHIEF EXECUTIVE OFFICER OF CUSTOMS v TOYOTA MATERIAL HANDLING AUSTRALIA PTY LTD and CROWN EQUIPMENT PTY LTD**
File number:	NSD 1663 **of** 2011
Judges:	**FINN, GILMOUR & PERRAM JJ**
Date **of** judgment:	**29 May 2012**

Catchwords:	**CUSTOMS AND EXCISE** – Tariff concession orders – whether pedestrian-operated reach trucks are 'substitutable goods' for rider-operated reach trucks – whether Tribunal misapplied test for substitutability – whether Tribunal impermissibly considered competition between imported goods and domestically-produced goods
Legislation:	***Customs Act 1901*** (Cth) ss 159, 269B, 269C, 269P(**1**), 269SJ(**1**)(aa) ***Customs Tariff Act 1995*** (Cth) ss 15(a), 16, sch 3
Cases cited:	*Riverwood Cartons* ***v Chief Executive Officer of Customs*** **(1997) FCR 493** applied
Date **of** hearing:	16 February **2012**
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number **of** paragraphs:	21
Counsel for the Applicant:	S Lloyd SC, H Younan
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the First Respondent:	M Fleming SC, M Felman
Solicitor for the First Respondent:	Bartier Perry
Counsel for the Second Respondent:	The second respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 1663 of 2011

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: **CHIEF EXECUTIVE OFFICER OF CUSTOMS**
Applicant

AND: **TOYOTA MATERIAL HANDLING AUSTRALIA PTY LTD**
First Respondent

CROWN EQUIPMENT PTY LTD
Second Respondent

JUDGES: **FINN, GILMOUR & PERRAM JJ**

DATE OF ORDER: **29 MAY 2012**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision **of** the Administrative Appeals Tribunal dated 30 August 2010 be set aside.
3. The decision **of** the applicant dated 4 March 2010 refusing the first respondent's TCO application be affirmed.
4. The first respondent pay the applicant's costs as taxed or agreed.

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

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JUDGES: **FINN, GILMOUR & PERRAM JJ**

DATE: **29 MAY 2012**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1. The first respondent, **Toyota Material Handling Australia Pty Ltd ('Toyota**'), is an importer **of** rider-operated reach trucks, a kind **of** forklift useful for stacking shelves in warehouses. The second respondent, Crown Equipment **Pty Ltd** ('Crown'), is a local manufacturer **of** pedestrian-operated reach trucks, a similar machine albeit one on which the operator does not ride. The present appeal from the Administrative Appeals Tribunal concerns the operation **of** the system **of** tariffs imposed on imported goods to protect the local manufacturing industries. The tariff on forklift trucks is 5% **of** their '**customs** value': ***Customs Tariff Act 1995*** (Cth) ss 15(a), 16, sch 3 (item 8427). The '**customs** value' **of** imported goods is calculated in accordance with s 159 **of** the ***Customs Act 1901*** (Cth) ('the Act').
2. Parallel to the imposition **of** tariffs exists a mechanism for tariff relief known as a 'tariff concession order' or 'TCO' for short. TCOs are made by reference to goods which are generically described: the Act, s 269SJ(**1**)(aa). **Toyota** applied for a TCO in respect **of** a generically described forklift where, it is not in dispute, the description was sufficiently broad to ensure that if the TCO were made **Toyota** would not have to pay the tariff on its imported forklifts. The **Chief Executive Officer of Customs**, who is the decision-maker when it comes to TCOs, refused to make the TCO but the Administrative Appeals Tribunal reached the opposite conclusion on review: ***Toyota Material Handling Australia Pty Ltd v Chief Executive Officer of Customs*** [2011] AATA 600. This appeal is concerned with whether that decision **of** the Tribunal was attended by legal error.
3. To reach its decision it was necessary for the Tribunal to be satisfied, inter alia, that **Toyota**'s TCO application met 'the core criteria': **s 269P(1).** It would meet those criteria only if, by s 269C, 'on the day on which the application was lodged, no substitutable goods were produced in **Australia**'. The expression 'substitutable goods' was defined in s 269B **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.

4. This provision calls for a comparison. 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.
5. 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.
6. The claim made by **Toyota** for tariff relief in its TCO had a number **of** technical features none

of which is presently **material**. What is significant, however, is the stipulation in the application for the TCO that the forklifts in question would have:

> Load capacity NOT less than 1200 kg @ 600 mm load centre at 5000mm lift height

and

> Maximum lift height NOT less than 5000mm

7. In layman's terms: the forklifts described in the TCO application could lift at least **1**,200 kg to at least five metres.
8. The Tribunal found that Crown produced, domestically, two forklift trucks bearing upon the TCO application. These were the WR 3040 and the 40 WR 3000. As to the former, the Tribunal made two findings: *first*, that it could lift **1**,200 kg to five metres; but, *secondly*, that in doing so it would be 'at its outside limits': at [28]. Similarly, the 40 WR 3000 'could lift **1**,244 kg to [five metres] but it would plainly be at the limit **of** its capacity in doing that': at [28].
9. Pausing there, there is no doubt that the TCO goods were capable **of** being used to lift loads **of** up to **1**,200 kgs up to five metres (since they could lift that load at least that far). It also follows from the Tribunal's findings that the WR 3040 and 40 WR 3000 were capable **of** being used to lift such loads to such heights. It is true, no doubt, that the TCO forklifts could lift more than 1200 kgs more than five metres (which the Crown forklifts could not) but that cannot erase the fact that both the TCO forklifts and the Crown forklifts could be used to do the same thing, namely, to stack shelves up to five metres high with loads **of** up to **1**,200 kgs. This conclusion would mean that the WR 3040 and 40 WR 3000 were, in relation to the TCO application, 'substitutable goods' unless – as in the example **of** the spoon and excavator – it was not a reasonable use **of** the TCO forklift to load shelves up to five metres high with loads **of** up to **1**,200 kgs.
10. The Tribunal concluded that there were no substitutable goods. It parted company with the above reasoning because, with respect, it overlooked the fact that the definition **of** 'substitutable goods' required not only a consideration **of** the actual uses to which the TCO goods were put but also, importantly, the uses to which they could reasonably be put. This approach caused it to put at nought in the process **of** comparison the fact that the TCO forklifts could be used to lift loads **of** up to **1**,200 kgs up to five metres (just as the WR 3040 and 40 WR 3000 could be used.)
11. That this is so is apparent from its reasons at [39] where it considered the definition **of** 'substitutable goods' in these terms:

> The definition does recognise that substitutable goods need not be coextensive with the TCO goods because there needs only to be one substitutable product and it needs to be substitutable for only one **of** the *uses to which the TCO goods are put.*
>
> (Emphasis added.)

12. The emphasised portion should, with respect, have referred instead to the uses to which the TCO goods *could* be put. This, in turn, caused the Tribunal to mishandle the factual evidence before it. The Tribunal dealt with the question **of** the use **of** the TCO goods this way (at [42]):

> It is necessary next to turn to use. I find that raising and stacking goods **of** lower weights to lesser heights, even though the TCO goods are capable **of** undertaking those operations, is not a use **of** the TCO goods for the purpose **of** the substitutability test because the TCO goods *would* only be used in a warehouse which required goods to be lifted to higher levels. To characterise a use **of** goods in a warehouse as a use **of** lifting goods to less than the full height **of** the racks in that warehouse would be to select a use which *was neither practical nor commercial* and which did not reflect *any actual use* in industry.
>
> (Emphasis added.)

13. In effect the Tribunal dismissed the significance **of** a factual matter it accepted (the capacity **of** the TCO goods to be used for uses for which the local goods were also capable **of** being used) because it found it would not be an *actual* use. In this process **of** reasoning the Tribunal replaced the standard required by the definition ('a use that corresponds with a use...to which the goods the subject **of** the application or **of** the TCO can be put': s 269B) with a different standard, namely, the relevant practical and commercial uses **of** the TCO forklift. Thus at [45] the Tribunal said:

> To be clear, I acknowledge that when the same goods can be put to different uses goods can be substitutable when substitution relates to only one **of** those uses. It does not seem to me, however, that lifting goods to 5,000 mm or less can be a separate use to lifting them 5,000 mm and above because the relevant practical and commercial use will be lifting and moving goods to particular racks. Where the racks are more than 5,000 mm high the pedestrian trucks will not be used and where the racks are lower the TCO trucks will not be used. This is not to say that rider trucks will not be used to place goods lower than 5,000 mm. They will. But it will generally only be in places where the racks are higher than 5,000 mm. That there **may** be minor exceptions to this, only proves the rule. This case is to be determined by the rule, not by the exception.

14. With respect, the minor exceptions did not prove the rule; rather, they showed that the definition **of** substitutable goods was met. As Goldberg J explained in *Riverwood Cartons* ***Pty Ltd v Chief Executive Officer of Customs*** [1997] FCA 817; **(1997) 77 FCR 493** at 497E, '[t]here is no requirement that the substitutable goods have only one use. The definition will be satisfied even if the substitutable goods... have a number **of** uses, only one **of** which corresponds with a use to which the imported goods can be put'.
15. It is easy to be sympathetic to the Tribunal's sensible commercial approach to the definition **of** substitutable goods – the facts as found by the Tribunal bear out the proposition that the Crown forklifts were

unlikely to compete with the TCO forklifts. From a practical or commercial perspective the forklifts manufactured by Crown operated in the under five metre market whereas the TCO forklifts plainly were more practically directed to the above five metre market. Commercially, these forklifts appear unlikely to compete.

16. The difficulty with this style of reasoning, commonsense though it may seem, is that it is expressly forbidden by the Act. Section 269B(3) provides:

> (3) 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.

17. The Tribunal's conclusions about the sensible commercial uses to which the forklifts could be put may be traced to [41] where it explicitly invoked this forbidden matter:

> The market for the TCO goods will be sale for use in warehouses with rack levels higher than 5,000 mm. This market will exclude reach trucks not capable of lifting to that level. No warehouse operator would purchase or use reach trucks which could not reach its highest racks. This conclusion is supported by the witnesses, particularly Mr Parbery. There is, of course, evidence that both rider reach trucks and pedestrian reach trucks could work in areas with lower racks. That is not, however, to the point. Just as buyers will not purchase or use reach trucks which cannot reach a buyer's highest racks, neither will they purchase or use trucks with a reach which exceeds requirements.

18. The first respondent submitted that this did not mean that the Tribunal had asked whether the forklifts competed with each other. However, we do not accept that submission: what is involved was the direct invocation of notions of competition. These considerations then led the Tribunal to conclude at [33]:

> There is plainly an overlap in the work which the two kinds of reach truck can undertake, but that is not the question.

19. In our opinion, this involved error because, with respect, it was the question. The first respondent sought to uphold the Tribunal's reasoning by arguing that the concept of 'use' was really a reference to the way in which the goods were, in fact, used; that is, 'use' involved real world notions. So viewed, a use to which a forklift could reasonably be put but to which it would not be put was not a 'use'. If this argument were correct then the definition of substitutable goods would not refer, as it does, to 'a use to which the goods...can be put', but instead to 'a use to which the goods...are put'. But the short of the matter is that the definition does use the word 'can'. It follows that 'use' is not a reference to sensible commercial uses (although, for the reasons we have given, it is a reference to reasonable uses).
20. This conclusion makes it unnecessary to consider the correctness of the applicant's argument that the Tribunal further erred by considering a representative example of the TCO goods. Had that question arisen there may have been much to be said for the applicant's submission. In particular, the selection

of a representative example **of** the TCO goods appears contrary to the stipulation in s 269SJ(**1**)(aa) that a TCO not be made in other than generic terms. However, it is not necessary to answer that question.

21. The decision **of** the Tribunal must be set aside. Given its findings there is only one possible outcome, namely, that the application to the Tribunal for review be dismissed and the decision **of** the applicant to refuse the TCO be affirmed. The first respondent must pay the applicants costs in this Court as taxed or agreed.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy **of** the Reasons for Judgment herein **of** the Honourable Justices Finn, Gilmour and Perram.

Associate:

Dated: **29 May 2012**
