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# Federal Court of Australia

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## Re Collector of Customs (Qld) v ← Times Consultants → Pty Limited [1986] FCA 413 (27 November 1986)

### FEDERAL COURT OF AUSTRALIA

Re: COLLECTOR OF CUSTOMS (QLD)  
And: ← TIMES CONSULTANTS → PTY LIMITED  
No. G249 of 1986  
Administrative Law

#### COURT

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

#### CATCHWORDS

Administrative Law - customs - Appeal from the Administrative Appeals Tribunal - tariff classification - magazines and cassettes dealing with classical composers sold as series of part works - put up in sets - whether essential character of set determined by magazine or cassette - error of law

Words or phrases: "essential character"

[Administrative Appeals Tribunal Act 1975](#) (Cth) [ss.32](#), [33](#), [44](#)

[Customs Tariff Act 1982](#) (Cth) Schedule 2, [Rule 3](#)

[Federal Proceedings \(Costs\) Act 1981](#) (Cth)

**HEARING**

SYDNEY

27:11:1986

**ORDER**

The appeal be allowed

The decision under appeal be set aside and the matter be remitted to the Administrative Appeals Tribunal for re-hearing with or without further evidence;

The respondent pay the applicant's costs of the appeal;

Liberty be reserved to the respondent to apply for an order under the [Federal Proceedings \(Costs\) Act 1981](#) (Cth).

Note : Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

**DECISION**

This is an appeal from a decision of the Administrative Appeals Tribunal delivered 26 May 1986. The decision accorded with the view of the majority of the members of the Tribunal, one member expressing a dissenting view.

2. The issue before the Tribunal was the classification for tariff purposes of certain goods imported by the respondent. The majority reasons stated the following facts, inter alia,

"Each of the relevant goods consists of a

publication in magazine form to which is loosely attached a pre-recorded tape of music. The attachment is by adhesive tape to a cardboard matching panel, which in turn is attached to the magazine by one or two staples. The tape is a cassette housed in a plastic box and both are clearly intended to be detached from the panel and

therefore from the magazine.

The magazine is described by the applicant as one of a series of a part work. Each part of the 52 part series is devoted to a particular classical composer. 'Part works' were said to be the constituents of a series of publications which broke down an existing book into parts (the Dickensian origin of the publishing form) or built up a new work with a common theme from the parts.

.....

The cassettes were produced independently of the magazine and without any thought of their association in the future. They were simply commercial recordings of popular classical works (some of them recorded quite a few years earlier) which the Polygram group had in stock and which the publishers decided to associate with their magazines.

.....

Each issue of the magazine is devoted to a separate composer. Within each magazine there are 3 sections. The first relates to the life of the composer and his friends, the second to a particular musical work, (and sometimes to a particular conductor or instrumentalist and his technique) and the third part relates to the historical background of the country and times in which the composer lived. There is also a continuing compendium of musical terms and a lavish illustration and simple explanation of various instruments of the orchestra.

.....

The middle section of each magazine is referred to as the 'Listener's Guide' and contains an analysis of a particular work of the composer. Themes from

the work are illustrated in musical notation and a detailed analysis is made (in colourful and easily understood phrases) of the development and features of each particular movement. The same work that is analysed in the magazine is recorded in the attached cassettes. There is what might be called a mood picture on the front of each issue, which, no doubt, is intended to depict the feeling that listening to the particular work induces."

3. In brief, the subject goods were a part of a magazine and a musical cassette. Parts of the magazine were intended to be issued every fortnight or so, a total of 52 parts being intended in all. Each part was devoted to a particular musical composer. The most notable composers, such as Beethoven, had several parts devoted to them. One section of each part was a "Listener's Guide" to a particular composition or particular compositions of the composer featured in the part. The attached cassette contained that composition or those compositions. The performances recorded on each tape were of renowned compositions played by well-known orchestras conducted by well-known or famous conductors. The recorded music, which was produced by the Polygram group, which encompasses such organisations as Decca, Philips and Deutsche Grammophon, was of high quality but had been superseded and was no longer sold in music shops, though this was not a fact stated on the goods. The magazine or part work could also be obtained with a musical record, in lieu of the cassette, but the Tribunal was not concerned with these.

4. The whole work was entitled "The Great Composers and Their Music". [Part 2](#) of Vol.1, devoted to Johannes Brahms, set out the following general information with respect to what was described as "The Collection" and I take it that a similar description appeared on the cover of each part:

"The Great Composers and their Music is published every fortnight in 52 parts. [Parts 1-20](#) feature composers of the Romantic Era; [parts 21-32](#) cover Baroque and Classical Music; the Age of Nationalism forms [parts 33-42](#); and Twentieth Century Music is discussed in [parts 43-52](#).

To help you understand the background to the music, the beginning of each section - [parts 1](#), [21](#), [33](#) and [43](#) - contains an introductory chapter to the period, which extends the issue to 32 pages. All other parts have 24 pages, not including the interim and final indexes.

An additional 13-part volume on opera will be

available after the publication of [part 52](#).

## The Index

To enable you to use The Great Composers and their Music as a permanent work of reference, an index will be included at the end of each section, in [parts 20](#), [32](#), [42](#), and [52](#). In addition, [part 52](#) will contain a complete index to the whole work.

## SOUND QUALITY

The finest recordings from Deutsche Grammophon, Philips and Decca have been used in The Great Composers and their Music. To maintain good sound reproduction from the records and cassettes please make sure that you read the instructions on the care of records and cassettes enclosed in early issues of this publication."

The cassette attached to [Part 2](#) of Vol.1, contained Brahms Symphony No.1 in C Minor, Opus 68, played by the Vienna Philharmonic Orchestra, conducted by Herbert von Karajan and was produced by Decca.

5. The task of the Tribunal was to determine the classification of the goods for the purposes of the [Customs Tariff Act 1982](#) (Cth) ("the Act"). Schedule 2 to the Act sets out Rules for the Interpretation for the tariff contained in Schedule 3. [Rule 3](#) of Schedule 2 provides:

"3.(1) Where, for any reason, goods fall within 2 or more items, 2 or more sub-items of an item, 2 or more paragraphs of a sub-item or 2 or more sub-paragraphs of a paragraph, the item, sub-item, paragraph or sub-paragraph, as the case may be, that applies to the goods shall, subject to sub-rule (3), be ascertained in accordance with the following principles:

(a) If one of the items, sub-items, paragraphs or sub-paragraphs, as the case may be, provides a more specific description of the goods than any other of the items,

sub-items, paragraphs or sub-paragraphs, that first-mentioned item, sub-item, paragraph or sub-paragraph, as the case may be, applies to the goods.

(b) If -

(i) the item, sub-item, paragraph or sub-paragraph that applies to the goods cannot be ascertained in accordance with paragraph (a);

(ii) the goods are -

(A) mixtures;

(B) composite goods consisting of different materials or made up of different components; or

(C) put up in sets; and

(iii) one material or component gives to the goods their essential character,

the goods shall be taken to consist of that material or component.

(c) If the item, sub-item, paragraph or sub-paragraph that applies to the goods cannot be ascertained in accordance with paragraph (a) or paragraph (b) the item, sub-item, paragraph or sub-paragraph, as the case may be, that applies to the goods is that item, sub-item, paragraph or sub-paragraph that occurs last in Schedule 3 amongst those items, sub-items, paragraphs or sub-paragraphs, which equally merit consideration when determining the item, sub-item, paragraph or sub-paragraph, as the case may be, that applies to the goods.

(2) For the purpose of sub-paragraph (1)(b)(ii), goods put in sets shall be taken to mean goods which -

(a) consist of products or articles having independent or complementary uses, grouped together for meeting a specific need or carrying out a specific activity; and

(b) are put up in retail packings.

(3) Where -

(a) for any reason, goods fall within 2 or more sub-items of an item, 2 or more paragraphs of a sub-item or 2 or more sub-paragraphs of a paragraph; and

(b) there is included in the sub-items, paragraphs or sub-paragraphs within which the goods fall any by-law sub-item, by-law paragraph or by-law sub-paragraph,

the sub-item, paragraph or sub-paragraph, as the case may be, that applies to the goods is that under which no duty, or the least amount of duty, is payable in respect of the goods or, if there are 2 or more sub-items, paragraphs or sub-paragraphs under which no duty, or the least amount of duty, as the case may be, is payable, that one of those sub-items, paragraphs or sub-paragraphs that occurs first in Schedule 3.

.....".

6. The Tribunal held that the goods were goods put up in sets as defined in [Rule 3\(2\)](#). That aspect of the Tribunal's decision was not challenged in this appeal. Nor in this appeal was challenge made to the Tribunal's next step of turning to the provisions of [Rule 3\(1\)](#) and, in particular, to the provisions of paragraph (b) thereof.

7. What was challenged in the appeal was the Tribunal's decision under [Rule 3\(1\)\(b\)\(iii\)](#) that the part work or magazine gave to the goods their essential character and therefore that the goods should be

taken to consist of that component.

8. For the appeal to succeed, it must be demonstrated that the Tribunal made an error of law. See s.44 [Administrative Appeals Tribunal Act 1975](#) (Cth). There is no general appeal from decisions of the Tribunal to this Court.

9. Before turning to the submissions put on behalf of the applicant, it is convenient to mention a matter which was not expressly raised in the Notice of Appeal and indeed was not the subject of submission by Mr G. Rowling, counsel for the applicant, though it seems to me to have led to errors relied upon in the Notice of Appeal.

10. In the classification of goods for the purpose of tariff, one is concerned with the essential character of goods, often with their composition and sometimes with their function. The tariff uses expressions which are not solely Australian expressions. Much of the Australian tariff is based upon the Brussels Nomenclature. Equivalent terms are found in many different languages throughout the world. The tariff is intended to be understood and acted upon both by persons overseas and in Australia, by exporters and importers. In these circumstances, one ought not, in classifying goods for the purposes of the tariff, to look for subtleties.

11. The majority of the Tribunal did, I think, become unduly subtle in their reasoning. Their reasons expressed the crucial finding,

"... What we have before us is a part work illustrated in a particular way - electronically rather than by steel engravings."

With due respect to the majority, such a statement introduces a complexity of thought that is inappropriate when one is seeking to arrive at a basic fact, namely, what is the essential character of the goods. Such an issue is ordinarily determined by the answers to one or more of the questions : what are the goods, what are they composed of and what is their function?

12. Persons examining the subject goods could conclude that the goods were a magazine and a cassette, that each of the magazine and the cassette were for individual use and enjoyment, namely, the magazine for reading and the cassette for listening to, and that, in addition, the magazine and the cassette were complementary in that the cassette provided an example of the work of the composer dealt with in the magazine, and therefore added to the stock of information and enjoyment that the magazine could give, and by its "Listener's Guide" to the work on the cassette, the magazine added to the understanding and enjoyment of the work performed on the cassette.

13. In other words, it is not readily apparent why someone looking at the goods would not say that the goods comprised a magazine and cassette and that each complemented the other. Indeed, that conclusion would not be inconsistent with the evidence of Mrs Mullineux, of which the majority



reasons, which relied upon that evidence, said, inter alia,

"... She gave evidence that she would not buy sets simply for the sake of the cassette, nor would she decline to buy the set if she had another recording of the work recorded on the cassette. She wanted the two of them together. Whatever the bargain value of the cassette alone, the value to her of the combination was apparently more attractive."

14. If this were the correct view of the goods, then the conclusion would be likely to be that neither article gave to the set its essential character because the essential character of the set was that it comprised two entirely different articles, each suitable for individual use but each complementing the other. On this view, it would be the combination of the two articles which gave the set its essential character.

15. The majority of the Tribunal did not approach the matter in this way. Rather, the majority looked not so much at the goods themselves but at a function served by the grouping of the goods. The majority said:

"As was argued by counsel for the applicant, if one accepts first that the reason for the classification of a set as a new entity or entirety is that there is a mutual interrelationship between its components in that they are grouped together to serve a function, then prima facie a set should only be classified by reference to its whole, rather than separately according to its components, if the function for which the goods were grouped together gives 'essential character' to the combination.

.....

We agree with counsel for the applicant that the issue in each case is whether after considering all these factors the cumulation of these factors gives dominance to one component. One of the principal factors pointing to the dominant component will be the use or function which the consumer or end user of the set will make of the

combination. In looking at that use, the parties will be assisted in deciding whether one component is dominant in achieving that function or use."

As a result of looking principally at function and of concluding that the goods were "a part work illustrated in a particular way - electronically", the majority turned its attention away from the goods themselves, which were a magazine and a cassette.

16. In determining the essential character of goods, one is seeking to determine what essentially the goods are, not some characteristic that the goods may have. Essential character looks to the basic nature of the goods, to what they are. Composition, function and other factors will play a part in this determination. The Oxford English Dictionary gives these meanings:

"Character ...

9. The aggregate of the distinctive features of any thing; essential peculiarity; nature, style; sort, kind, description ...".

"Essential ...

2. of or pertaining to essence, specific being, or intrinsic nature. ..."

"Essential character : in scientific classification, the marks which distinguish a species, genus, etc. from the others included with it in the next superior division."

17. When there is a set of goods of which one good has a nature or composition different from the other or others, it is possible on occasions to give an essential character to the totality of the goods. This occurs, for example, where one good is merely incidental or ancillary to the other or others. A motor vehicle which is imported, together with an owner's instruction manual and spare tools, may be classified for duty with the instruction book and the tools as a motor vehicle. I need not point to other illustrations. In such a case, the presence or absence of the good which is incidental or ancillary to the other or others will not affect the essential character of the set.

18. But where two goods have a different composition and nature and are put together in a set because they complement each other and because each adds a significant quality that the other does not have, one cannot ordinarily say that one article only gives to the set its essential character.

19. The argument, on appeal, was not put in these terms, presumably because Mr Rowling submitted

with vigour that, in the subject set, it was the cassette which gave to the goods their essential character and the Court ought to so find. But there are grounds of appeal which reflect the point I have made.

20. It is not necessary that I should set out the precise grounds raised in the Notice of Appeal. In the course of submissions made, those grounds were varied and expanded and the points made were put in in a number of ways. The first major issue is whether the Tribunal erred in law in refusing to reject evidence, adduced on behalf of the present respondent, to which objection was taken at the hearing. The learned presiding member of the Tribunal rejected many objections to evidence. One of his rulings, given early in the hearing, sets out the substance of the view taken:

"I think we have got to take a liberal view of the adducing of evidence in these matters. The sort of evidence that this witness is giving and has given is fairly liberal in its background. I think, subject to irrelevance, the document ought to be taken in. It will be exhibit C. Its relevance will appear later on in consideration of the other evidence."

21. I agree with the view there expressed and with the course that the Tribunal took. The Tribunal is not bound by the rules of evidence. See [s.33\(1\)\(c\)](#) of the [Administrative Appeals Tribunal Act](#). In many matters which are before the Tribunal, the parties and their representatives are not well qualified to analyse the issue before the Tribunal and to adduce only relevant evidence with respect to it. An applicant to the Tribunal may appear in person or be represented by whomsoever the applicant chooses. See [s.32](#) of the [Administrative Appeals Tribunal Act](#). Even when applicants and respondents are represented by lawyers, those lawyers do not necessarily have expertise in the particular area with which the Tribunal is dealing. There are obviously sound grounds why a tribunal may prefer to receive into evidence material which may ultimately be found not to be relevant. A tribunal may wish to give a party before it an opportunity to put that party's case as the party sees it. Or, as in the present case, the Tribunal may think it difficult to rule upon aspects of relevance early in the hearing and may think it better to receive too much information than too little.

22. Much of the evidence objected to related to the trade in which the goods were produced and dealt with. It is not an error of law for a tribunal, when considering a customs classification, to receive such evidence when the evidence may be relevant and is not prejudicial to the Tribunal's consideration. There was no material admitted by the Tribunal against objection which, in my opinion, ought to have prejudiced it against coming to the correct result.

23. It was submitted that the Tribunal ought not to have taken into consideration the evidence of Mrs E.M. Mullineux, a purchaser of the goods, who gave evidence as to the goods and the reasons why she purchased them. For my own part, I think that the evidence which Mrs Mullineux gave was

confirmatory of the conclusion that a person informed as to the trade would have drawn, namely, that most persons purchasing such goods would do so because the magazine and the cassette were an inexpensive means of obtaining knowledge and enjoyment. Mrs Mullineux' evidence was not irrelevant.

24. However, the use which the Tribunal made of the evidence objected to is another matter.

25. I have already referred to the crucial paragraph in the reasoning of the majority setting out their conclusion that the goods were a part work illustrated electronically. Another important paragraph in the majority's reasoning read as follows:

"Having considered all these factors, we have come to the conclusion that the magazine is the dominant component in the sets, both from the point of view of the publisher and the point of view of the consumer. The magazine we find is by far the most important factor in the creation of the product (from the publisher's point of view) and in its purchase (from the purchaser's point of view). From the publisher's point of view the series of 'Great Composers' is yet another series of printed part works which it has devised and produced along with a large range of other printed part works. The nature of the subject matter means that the most effective illustration to the ordinary purchaser of the material, the subject of the magazine articles, is not so much the themes illustrated by musical notation (although there is some of this) as a recording. The possibility of relatively cheap illustrations that can be sold as part of the principal product is a happy accident, leading to the preparation of a set, which when examined at the time of importation by a reasonably informed observer illustrates this purpose and intention."

26. It will be noted that the majority referred to the "dominant component", which was not the issue. The essential character of the goods was the issue. Dominance may be relevant to but is not determinative of the issue.

27. The majority then referred to "the most important factor in the creation of the product (from the publisher's point of view)". Yet what was important from the publisher's point of view was one thing.

What was the essential character of the goods was another. One of the grounds of the appeal was that

"The Tribunal erred in law in taking into account the manufacturer's intentions in respect of the dominance of a component of the subject goods ..."

I would not uphold this ground in the sense that the Tribunal made an error in admitting evidence. But in the end, it seems to me that what the publisher had in mind as important from its point of view, production, sales and profits, was not a significant matter in determining what was the essential character of the set.

28. The majority then went on to say that the magazine was by far the most important factor "in its purchase (from the purchaser's point of view)". In this the majority relied upon evidence of Mrs Mullineux, but failed to refer to the evidence of Mr D.L. Brouner, who gave evidence that,

"... Having marketing expertise, for which I am employed, the cassette would be of greater value than a 20 page booklet to the vast majority of the market I retail to."

Mr Brouner said that, in this evidence, he was speaking of value in the terms both of price and of worth. This evidence was not discussed. Moreover, the majority of the Tribunal did not refer to some of the material put in with respect to advertisement testing, which included the statement,

"Going back to the point about structural reversal, after they had seen the product the respondents all agreed the dominant component was the record. This was not to say that the magazine was insignificant or unimportant, but it was the servant of the record and that the major value component was the record."

and "It would appear that, whilst the music is the

major item in the package, it is not sufficient for people who have already made some commitment to classical music to activate purchase ...".

29. I do not suggest that the matter ought to have been dealt with by weighing up the evidence of one witness as against the other. However, to the extent that Mrs Mullineux' evidence was helpful, so also was the evidence of Mr Brouner. As the Notice of Appeal stated, the majority of the Tribunal failed to "take into account the relevant evidence of Mr Brouner". The majority did not mention Mr

Brouner's evidence.

30. As I have mentioned, the majority spoke of the cassette as "an illustration". Yet the cassette was not an illustration, it was a high quality recording of Brahms well-known Symphony No.1 in C Minor played by the Vienna Philharmonic Orchestra conducted by Herbert von Karajan. Such a cassette has a value of its own and a use independent of the magazine. It does not seem to me to be appropriate to describe it as an illustration. This indeed was the effect of Mr Brouner's evidence which, as I have said, was not referred to by the majority of the Tribunal in their reasons.

31. For these reasons, therefore, I am of the view that the majority of the Tribunal made an error of law in its conception of "essential character", took into account as significant evidence as to the publisher's aims and views which were not in fact significant to the issue of essential character, drew conclusions as to a purchaser's view of the goods based on Mrs Mullineux' evidence without giving attention to Mr Brouner's evidence and other material before the Tribunal and failed to turn its attention adequately to the goods themselves, to their nature, composition and their function.

32. Thus, the appeal must be allowed, the decision under appeal set aside and the matter remitted to the Administrative Appeals Tribunal for re-hearing with or without receiving further evidence.

33. The applicant sought costs of the appeal. The grant of costs was opposed by Dr G.A. Flick, counsel for the respondent, on the basis that the matter had arisen before a Tribunal in which costs were not awarded and that it was undesirable that the applicant before the Tribunal should become involved in costs on an appeal. Certainly, there are quite strong reasons of policy from the Tribunal's point of view why respondents to proceedings in the Tribunal, who successfully appeal to this Court, should not seek an award of costs if successful. And frequently, such costs are not sought. But, in the present case, both parties appeared by counsel on the appeal and put arguments for and against their respective positions. I think the ordinary rule should apply and that the successful party should have its costs. I shall therefore order that the respondent pay the applicant's costs of the appeal. I shall reserve liberty to the respondent to apply for an order under the [Federal Proceedings \(Costs\) Act 1981](#) (Cth).

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