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← Toyota Material Handling → Australia Pty Ltd and Chief Executive Officer of Customs and Crown Equipment Pty Ltd (Joined Party) [2011] AATA 600 (30 August 2011)

Last Updated: 30 August 2011

[\[2011\] AATA 600](#)

Division	GENERAL ADMINISTRATIVE DIVISION
File Number	2010/1318
Re	← TOYOTA MATERIAL HANDLING → AUSTRALIA PTY LTD
	APPLICANT
And	CHIEF EXECUTIVE OFFICER OF CUSTOMS
	RESPONDENT
And	CROWN EQUIPMENT PTY LTD
	JOINED PARTY

DECISION

Tribunal	JUSTICE DOWNES, PRESIDENT
Date	30 August 2011
Place	Sydney

1. Set aside the decision under review.
2. Substitute a decision to make Tariff Concession Order 0918546.

.....[sgd].....

Garry Downes

President

CATCHWORDS

CUSTOMS - tariff concession order - goods covered - identification - whether substitutable goods - meaning of 'use' - class of goods - retractable mast fork-lift reach trucks - rider operated trucks - pedestrian trucks not substitutable – tariff concession order made.

RELEVANT ACTS

[Customs Act 1901](#) (Cth)

[Customs Tariff Act 1995](#) (Cth)

CITATIONS

Re Vulcan Australia Pty Ltd and Comptroller-General of Customs [\[1994\] AATA 150](#); [\(1994\) 34 ALD 773](#)



Re Thirco Pty Ltd and Comptroller Of Customs and Bowater Tissue Ltd [\(1994\) 35 ALD 665](#)

REASONS FOR DECISION

Tribunal **JUSTICE DOWNES, PRESIDENT**

Date **30 August 2011**

SUMMARY

1. There are many kinds of fork-lift trucks. Two of them are rider operated reach trucks and pedestrian operated reach trucks. Both kinds are used to stack shelves in warehouses. The word “reach” describes the capacity of the trucks to lift goods to higher levels.
2. There are pedestrian reach trucks manufactured in Australia. Rider reach trucks are imported. The question in this case is whether some Australian manufactured pedestrian reach trucks are substitutable for some rider reach trucks. If they are not,  **Toyota Material Handling**  Australia Pty Ltd and other importers of those rider trucks, will be entitled to the benefit of a tariff concession. I have decided that the pedestrian trucks are not substitutable for the rider trucks and Toyota is entitled to the concession order.

Background

3. Customs Tariff Item 8427 deals with “Fork-lift trucks; other works trucks fitted with lifting or handling equipment”. There are three sub-categories:
 - o 8427.10.00 Self-propelled trucks powered by an electric motor
 - o 8427.20.00 Other self-propelled trucks
 - o 8427.90.00 Other trucks

In each case the duty is 5%. Goods covered by a tariff concession order are free of duty.

4. On 9 June 2009 Toyota applied for a tariff concession order (TCO) for certain of its fork-lift trucks. Such applications, if granted, benefit all importers of goods satisfying the description in the application. The goods specified by Toyota were as follows:

DESCRIPTION OF GOODS

“Reach Trucks, retractable mast, narrow aisle, rider seated as defined in Australian Standard AS2359-7:1995 clause 3.1.3.1.2 having all of the following:

- (a) Load capacity NOT less than 1200kg @600mm load centre at 5000mm lift height;
 - (b) Maximum lift height NOT less than 5000mm;
 - (c) Height with collapsed mast NOT exceeding 4900mm;
 - (d) Operator in a seated position within an operator’s compartment at right angles to the direction of travel;
 - (e) Overhead guard to protect operator;
 - (f) Maximum travel speed NOT less than 10km/h;
 - (g) Battery powered system NOT less than 36 volt;
 - (h) Power assisted steering.”
5. All fork-lift trucks have the feature of lifting goods on pallets, moving them and stacking them. Not all aspects of these functions are, however, performed by the same equipment. Different types of fork-lifts have been developed to undertake different functions. Loading pallets on to a truck at a wharf is different to placing them in a warehouse on racks eight metres high. There is no universally recognised classification of fork-lifts, but the classifications adopted within the industry, particularly by manufacturers, importers and distributors, are broadly similar.
 6. Counterbalance trucks are the most typical fork-lifts. They are generally powered by internal combustion engines. They are called counterbalance trucks because they rely on a weight at the back of the truck to counterbalance the weight on the fork. Counterbalance trucks are used outdoors as well as indoors. The fork will move vertically but will not generally extend or retract. Counterbalance trucks are operated by a seated driver who generally faces forward.
 7. Reach trucks will not generally operate outdoors, although they will unload pallets from a truck near a warehouse, if the surface is mainly flat. They will, however, lift pallets to significant heights, some of them to twelve metres or more. They have a fork which will extend and retract. Many of them have straddle legs extending forward, beside the fork, which are an aid to stability. These legs complement the counterbalance generally provided by the vehicle’s battery which is located at the back of the truck opposite to the load-bearing fork. The purpose of the extending fork is to enable pallets to be placed on racks without the straddle legs needing to pass under the racks and to allow pallets wider than the straddle legs to be picked up.
 8. Some reach trucks are operated by a rider standing; some by a rider seated. Others are operated by a pedestrian. This case deals with whether there are pedestrian trucks which are substitutable for certain rider seated trucks. As a broad proposition, rider seated trucks can operate with heavier loads, to greater heights, than pedestrian trucks.

The Legislation

9. [Section 269F](#) of the [Customs Act 1901](#) (Cth) authorises the making of applications for tariff concession orders. Orders are made by the Chief Executive Officer of Customs. The CEO is to make a concession order if satisfied that “on the day on which the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business” ([s 269C](#)). By a definition in [s 269B](#):

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.

10. The initial decision of the CEO is subject to internal review at the request of any “affected person” ([s 269SH](#)). Application may be made to the Administrative Appeals Tribunal for review of a decision made pursuant to internal review ([s 273GA\(1\)\(n\)](#)).
11. In the present case the CEO initially made a TCO in accordance with the application. On review, this decision was reversed and the TCO revoked. Toyota has applied to the Tribunal for review of that decision.
12. The principal opponent of Toyota’s application is Crown Equipment Pty Ltd. Crown originally objected to Toyota’s application and it made the successful application for review of the initial decision. Crown was joined as a party in these proceedings.
13. In the hearing before the Tribunal neither Toyota nor Crown were represented by lawyers. They were represented by customs agents. The CEO was represented by its own legal counsel.

The issue is substitutability

14. Pursuant to the legislation, the following questions arise for consideration in this case:
 - o (a) What are the goods the subject of the application?
 - o (b) To what use or uses (including a design use) can those goods be put?
 - o (c) Are there goods produced in Australia that are put, or are capable of being put, to a use which corresponds with that use or one of those uses?
15. The first question is answered conclusively by reference to the goods described in the TCO application. The Act proceeds on the assumption that an application will identify something capable of being described as goods, but what those goods are, and how they are described, is entirely a matter for the applicant, who will succeed or fail by the description chosen.
16. Although the Act requires a TCO application to contain “a full description of the goods” (s 269F(3)(a)) it does not require the use or uses of the goods to be specified, although it does require “a statement of the tariff classification that, in the opinion of the applicant, applies to the goods” (s 269F(3)(b)). The description and statement will inevitably be relevant to use, but will generally fall short of a complete specification of use. The goods described in a TCO can be a single product. The goods described are frequently, as they are here, a class of goods.
17. Answering the second question requires fact finding relating to use. This inevitably requires some fact finding as part of considering the first question because of the relationship between use and description. In the end a TCO will benefit importers of actual goods and not merely theoretical goods. Where the TCO goods are described as a class, more difficult issues of characterising what are “the goods” and what are the uses to which they can be put, will arise.
18. This problem does not generally arise when dealing with the third question. It is only necessary to show that a single product is substitutable, to satisfy the applicable test. The goods to be tested as substitutable are, for practical purposes, nominated by an objector, in this case Crown.

The Goods

19. Before resolving these issues it is appropriate to examine in a little detail what goods will satisfy the description in the TCO application and what goods are relied upon as substitutable for them.
20. The TCO goods must all have the following characteristics:

(a) They must be reach trucks with moveable (retractable) masts. It is the movement of the masts which effects the

extension and retraction of the fork in these trucks.

(b) They must be able to lift 1200 kg at 600 mm load centres to at least 5,000 mm. All such products will be able to lift the same and different weights to lower heights. Some products will be able to lift the same and different weights to greater heights.

(c) Their height, with collapsed mast, must not exceed 4,900 mm.

(d) They must be operated by a seated driver who must be protected by an overhead guard.

(e) They must have power steering and travel at a speed of at least 10km/hr, powered by a battery of not less than 36 volts.

21. While there may be many products capable of being imported into Australia which fall within the TCO description, the evidence before the CEO and before the Tribunal substantially related to products imported and distributed by Toyota. These included models from Toyota’s BT Reflex RRE range, from its FBRE range and from its BT Reflex M range. These are all rider seated vehicles. The products particularly relied upon by Toyota were from its BT Reflex RRE range and particularly two of those products (the RRE 140 and the RRE 160) which both satisfied the TCO description. The BT RRE 120M from the Reflex M range was given as an example of a rider truck which did not satisfy the TCO description because it could not lift 1,200 kg to 5,000 mm. The Crown evidence included reference to the FBRE range.
22. Two ranges of pedestrian reach trucks are relied on as substitutable. They are the Crown WR Series 3000 and the Crown SHR series. Primary reliance is placed on the WR series because its capacity to lift heavy weights to high levels is greater than the capacity of the SHR series.
23. The evidence of Mr Stephen Barnes, from Crown, establishes that the SHR range was substituted for the WR 3000 range in July 2008. Production capability was retained for the WR 3000 series up to May 2009. Sales of the series continued until at least 2010.
24. Section 269C requires the issue of whether there are substitutable goods to be determined on the day on which the application was lodged. That was 9 June 2009. The test is whether “substitutable goods were produced in Australia in the ordinary course of business” on that day. By s 269E goods “are taken to be produced in Australia... if... they have been produced in Australia in the 2 years before the application was lodged.”
25. The average annual market for new fork-lift trucks in Australia is about 15,000 units although this number has not been realised in the last two years. I have been provided with figures drawn from reports provided to industry members by an organisation which processes the figures which members provide. The figures are divided about equally between internal combustion driven trucks and battery/electric powered trucks. This case is concerned only with the latter. The figures for battery/electric trucks are divided into eight categories. Three of these categories are “NARR AISLE Stand”, “NARR AISLE Sit” and “PED LIFT”. The evidence of Stanley Palmer, from Toyota, shows that the second and third of these categories relate to rider seated reach trucks and pedestrian reach trucks. The first category relates to reach trucks operated by a standing rider.
26. The categories are not further broken up by extent of reach. The rider seated trucks sell in slightly less numbers than the pedestrian trucks. In recent years the numbers have been as follows (the percentages are percentages of the total number of fork-lifts sold):

	Seated		Pedestrian	
2011 (YTD)	529	7.6%	739	10.6%

2010	906	7.7%	1115	9.4%
2009	956	7.4%	1285	10.0%
2008	1564	8.3%	1724	9.1%

27. Toyota adduced evidence relating to the lifting capacities of its BT RRE 120M, its BT RRE 140 and its BT RRE 160, together with evidence relating to the Crown SHR 5540-16 pedestrian truck. This showed that Toyota's BT RRE 140 and 160 could lift 1,200 kg to 5,000 mm, but that the Toyota BT RRE 120M and the Crown SHR 5540 could not. The Crown truck could lift 1,200 kg to 3,960 mm and 900 kg to 5,000 mm (to a maximum of 5,335 mm). The Toyota BT RRE 120M could lift 1,200 kg to 4,500 mm and 1,000 kg to 5,000 mm (to a maximum of 5,400 mm). The RRE 140 could lift 1,400 kg to 5,700 mm and 1,150 kg to 7,500 mm. The RRE 160 could lift 1,600 kg to 5,700 mm down to 1,000 kg to 10,000 mm.
28. Crown adduced evidence relating to the lifting capacities of its WR 3030 and 3040 together with evidence relating to the Toyota FBRE range as well as its BT RRE range and BT Reflex M range. The WR 3030 could lift less than 1,200 kg to 5,000 mm with a maximum lift of about 1,050 kg to 5,400 mm. The graph in evidence suggests (by extrapolation) that the WR 3040 could just lift 1,200 kg to 5,000 mm, but it would be at its outside limits. Further evidence relating to this capacity, filed by Crown at my invitation after the hearing, does not really make the situation any clearer. It suggests, still by extrapolation, that a "[40 WR 3000](#)" could lift 1,244 kg to 5,000 mm but it would plainly be at the limit of its capacity in doing that.
29. Crown's evidence shows that the FBRE range could all raise 1,200 kg to at least 7,000 mm and some of them to 8,000 mm. They could all lift 1,000 kg to 7,400 mm and two of them to 8,500 mm. The evidence also shows that all of the Toyota RRE models listed could lift 1,200 kg to at least 6,500 mm and some of them to nearly 9,000 mm. One of the RRE models could lift to 11,000 mm.
30. In addition to precise evidence of the lifting capacities of the reach trucks, evidence was given by two independent experts and by employees from Crown and Toyota who had considerable expertise in the use of the trucks. This evidence tended to concentrate on rider trucks generally, rather than the class of rider trucks described in the concession application. I also saw demonstrations at both Crown and Toyota and visited a warehouse and a small workshop where reach trucks were used.
31. Toyota called two independent experts, Stephen Parbery and Glenn Duncan. Mr Parbery gave a "work application for the Crown WR" and compared it with "Moving Mast Reach Trucks". He said:

WR units cannot operate in these high volume quick pick areas with a maximum lift to only 5.5 metres and would only make the 3rd level rack of most warehouses of this type which leaves the remaining 3-4 storage bays above unreachable and with a maximum walking speed of approximately 4 klms per hour productivity would come to a crawl not to mention the numbers of operators needed to make it work.

Glenn Duncan described his opinion of "the 'Fit for Purpose' use of the Crown Walkie Reach Truck". I did not, however, find his analysis to be particularly helpful.

32. The remaining witnesses were employed by the parties. Their expertise in the marketing and use of reach trucks, however, is not in doubt. Along with all the evidence, the evidence they gave must be qualified by the fact that they did not mostly address the precise rider trucks covered by the TCO description, but rider reach trucks generally, albeit referring generally to their capacity to lift loads to higher levels.
33. The evidence of all the witnesses and the documentary evidence establishes to my satisfaction that rider reach trucks can undertake most, if not all, of the functions which pedestrian reach trucks can undertake. But it also established that, except possibly at the margins, there are functions which the TCO goods undertake which pedestrian reach trucks cannot. There is plainly an overlap in the work which the two kinds of reach

trucks can undertake, but that is not the question. The question is whether pedestrian trucks are substitutable for uses of the TCO trucks.

The Test

34. This raises a question of what is meant by the word “use” which is twice used in the definition of “substitutable goods”.
35. In describing the TCO goods as having a capacity to lift 1,200 kg to “NOT less than” 5,000 mm and having a maximum lift height of “NOT less than 5,000 mm” the TCO application is not describing reach trucks which have a maximum reach of just above 5,000 mm. It is describing goods which may lift considerably higher. Because the TCO description does not have an upper limit of height or weight it must be read such that all reach trucks with more than its minimum capacity will fall within it. Trucks which can lift 1,200 kg to considerably more than 5,000 mm are just as much within the class as those with lower capacity. This is borne out by an examination of the goods in the market which in fact satisfy the description. They include reach trucks which can lift substantial weights to 11,000 mm and 1,200 kg to more than 8,000 mm.
36. Is it appropriate to select a representative product or range of products from the goods described in the TCO application, and treat those products as “the goods the subject of the application”; or will all products satisfying the class definition each individually be correctly treated as “the goods the subject of the application”? In the latter case, there may be a number of different products or ranges of products, each of which are correctly treated as “the goods the subject of the application”. The question would then be whether there are any Australian made goods that are substitutable for any goods that satisfy the TCO description, even though for other goods within the TCO description, there are not.
37. It does not seem to me, however, that it is appropriate to choose particular products and treat each one as the TCO goods for testing whether or not there are substitutable goods. By specifying that a TCO application must be “in respect of goods” (s 269F(1)), the Act is demonstrating that TCO goods must have some common or unifying characteristics which justify their being collectively referred to as “the goods” (s 269F(3)). It seems to me that the TCO goods must be identified as a group of products which are representative of a class which together answers the description “the [TCO] goods”. A single product is unlikely to be representative of the class. If, however, such a product could be identified it would not be at the edge of the range.
38. While it would not be correct to characterise the use of the TCO goods by reference solely to the performance of trucks at the higher end of the class, neither would it be correct to characterise their use by reference solely to goods at the lower end of the class. In referring to the TCO goods, the definition must be positing a group of products which are representative. They will not lift all goods to the highest levels, but neither will they only lift goods to the lowest levels. It will certainly not be appropriate to select only one product in the class, particularly at one extreme of all the products in the class.
39. 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. The definition does, however, proceed on the basis that the goods, though forming a class, will be capable of a single general description. The question is whether representative goods have a use for which there are substitutable goods, not whether there is one product which has a use for which there are substitutable goods. How the class is ultimately identified for the purpose of comparison will be determined in a practical and commercial manner.

The TCO Goods

40. Applying these considerations, I propose to proceed on the basis that the TCO goods will be able to lift loads higher than 5,000 mm although not all to the highest levels. They will generally be able to lift 1,200 kg comfortably above 5,000 mm. None of the goods relied on as substitutable would satisfy these requirements

even if they were rider operated and satisfied the terms of the TCO description apart from lift height and weight.

41. 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.

The Use of the TCO Goods

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.
43. For all these reasons, I find that the TCO goods are goods which can lift 1,200 kg to a range of heights which are not less than 5,000 mm and that their only relevant use for present purposes is lifting weights from nominal weights to a range of weights not less than 1,200 kg and to raise those weights from the ground to and from levels between ground level and a range of heights that are not less than 5,000 mm.

Substitutability

44. Once use is identified as the comprehensive use of lifting to levels from near the ground to 5,000 mm and a range of heights above, any practical and commercial examination of whether the Crown pedestrian trucks can be substituted for that use must be answered in the negative. This is so whether one looks at the WR range or the SHR range. They simply are not going to be used in locations with racks higher than 5,000 mm, whether the rack heights are to 6,000 mm or 11,000 mm. They will be used in locations with rack heights close to, but generally less than 5,000 mm, where they may compete with rider operated reach trucks, but only such trucks as cannot lift any higher than the pedestrian trucks.
45. 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 to 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.

Other factors

46. Although the matters I refer to in this section are not essential to my decision, I think that they tend to support it. For example, the fact that the TCO goods are rider operated and the goods claimed to be substitutable are pedestrian operated supports the conclusion. I am conscious of the fact that it has been held that use should be tested by result and not by the means by which the result is achieved (*Re Vulcan Australia Pty Ltd and Comptroller-General of Customs* [1994] AATA 150; (1994) 34 ALD 773; *Re Thirco Pty Ltd*

and *Comptroller of Customs and Bowater Tissue Ltd* (1994) 35 ALD 665) so that, for example, electric radiators may be substitutable for kerosene radiators. Use in the present case, however, is the actual moving, lifting and stacking of the goods so that it is more difficult to characterise use by result. Use in the present case is movement (of goods) and not a consequence of the movement (such as holding the goods in racks). That is a different use of different goods. Racks made of aluminium could be a substitute for racks made of steel, provided they were adaptable to the same storage uses. Just as moving material by wheelbarrow is different to moving material by tip truck, so too is moving goods with a rider operated vehicle different to moving goods with a pedestrian operated device.

47. Similar considerations apply to the speed of movement of the device. The evidence is that pedestrian trucks operate at walking speed of 4 to 5 km per hour while rider trucks can operate at 10 km per hour and more. Reach trucks which have a seated operator and travel faster than pedestrian trucks are likely to be attracted to different uses than pedestrian operated reach trucks.
48. The overhead protection offered to rider truck operators is in a slightly different character, although the higher goods are to be raised and the heavier they are, the more likely it is that such protection will be desired. Operator protection from falling goods can be seen as one of the characteristics of rider trucks with high reach. This characteristic will affect use.
49. It is also worth noting that the industry itself appears to proceed on the basis that pedestrian trucks are separate products to rider trucks, as the statistics referred to above, show. Such classifications will not necessarily only reflect use, but use will generally be a factor.

Conclusion

50. It accordingly seems to me that none of the goods relied upon as substitutable goods, whether the Crown WR pedestrian reach truck or the Crown SHR pedestrian reach truck, are goods that are put, or capable of being put, to a use that corresponds with a use to which the goods defined in the tariff concession order application can be put. It follows that the decision of the Chief Executive Officer of Customs must be set aside and a decision that the goods are entitled to the benefit of a tariff concession order substituted.

I certify that the fifty (50) preceding paragraphs are a true copy of the reasons for the decision herein of Justice Downes

.....[sgd].....

S Robson, Associate

Dates of hearing	25 - 29 August 2011
Date final submissions received	2 August 2011
Advocate for the Applicant	Mr John Dunkley
Solicitors for the Respondent	Mr Roger Northcote
Advocate for the Joined Party	Mr Mike Watson

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