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Submission 7.2

FACSIMILE COVER SHEET

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From: Reg Benson

To: The Hon. Bronyn Bishop MP

To Fax No. 6277 4773

No. of Pages: 24
(including this header)

Date: 19th December, 2003

MESSAGE

Dear Mrs Bishop,

This supplements the comments and documents faxed to you earlier today.

10. Copy of one of the Informations charging Tavemar Pty. Ltd with Smuggling "Speed Queen" washer extractors. Tavemar Pty. Ltd. was a competitor of Pearson and was also caught up in the attempt by Customs to illegally "protect" a local producer of domestic washing machines from a perceived threat from commercial washer extractors from the smaller end of the scale for such machines but still larger than domestics and priced at 2 - 3 times the price of domestics. The Informations, being also drafted in the Australian Government Solicitor's Office, are in similar form to Pearson and Averment 10 most closely matches Averment No. 6 in Pearson. However, a different barrister prosecuted Tavemar and did not raise the spurious argument about *issue estoppel, res judicata or decisions in rem.* Consequently, Tavemar was able to call expert witnesses and succeeded in having all charges dismissed.

    The copy supplied came from defence counsel's brief and contains some of counsel's handwriting.

11. Copy of the minutes of a conference with advisers to the Hon Senator Vanstone when she was Minister for Customs. A high degree of agreement was reached and no serious complaint was made as to the accuracy of the minutes. The Minister met with the C.E.O. of Customs but was told not to interfere. A copy of a letter conveying that result is included in Tab 6 in the binder which I sent to Mr. Cadman.

12. A summary of a simplified method of properly classifying the machines imported by Pearson (and Tavemar) illustrating that the correct duty was paid in each case. I am able to also provided copies of the statements of

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expert witnesses to confirm that the goods were washer extractors and that the outer cylinder is the cylinder referred to in TC 8530085.

13. An overview of why the prejudice and malpractice in Pearson may have occurred.

It has been difficult to assemble all of the appropriate documents at such short notice. I apologise if some are too lengthy. If I can assist further, please contact me.

Reg Benson
Solicitor

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SUMMONS --- DIVISION 1 AND 2, "JUSTICES"

CUSTOMS ACT 1901 SECT

TO: **TAVEMAR PTY LIMITED** of 9 Traynor Avenue, KOGARAH in the State of New South Wales,

Whereas information hath this day been laid before the undersigned, one of Her Majesty's Justices of the Peace in and for the State of New South Wales, by STEVE PEFKOS an officer of Customs duly delegated by the Comptroller-General of Customs to institute this Customs prosecution in the name of the said Comptroller-General of Customs for that you did, on or about the twentieth (20th) day of January 1987 at Sydney in the said State, smuggle goods, to wit, 73 "Speed Queen" washing machines being 35 models number WA4711, 32 models number WA4951 and 6 models number HA4511 (hereinafter called "the goods").

20/1/87

AND WHEREAS in the Information the prosecutor avers that:

1. STEVE PEFKOS is an officer of Customs currently holding a position to which the said Comptroller-General of Customs has delegated his powers to bring this Customs proscution.

2. Commercial Customs Services Pty Limited, a company incorporated in and in accordance with the laws of New South Wales, was at all material times the agent for and authorised by the defendant in respect of clearance through Customs of shipments from outside Australia to the defendant within Australia.

3. The defendant caused the said goods to be brought from parts beyond the seas to Sydney on the vessel Burling Island which arrived on or about 20 January 1987 for the purpose of discharging them in Sydney and the goods were discharged there.

4. An Entry for Home Consumption No. 1S.7020.0226P was made and produced in respect of, inter alia, the said goods on 20 January 1987 on behalf of the defendant by Commercial Customs Services Pty Limited.

5. The said entry contained the particulars that the said goods were classified to sub-item 84.40.200 of the Third Schedule of the Customs Tariff Act 1982.

Commercial

6. The said entry contained the particulars that the goods were entitled to the rate of duty payable under Bylaw 8530085.

7. Bylaw 8530085 related only to washing machines, washer ~~extractors and tumble~~ dryers having a dry linen capacity not less than 10kg/batch and which were classified to sub-item 84.40.200.

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8. The rate of duty payable under sub-item 84.40.200 was 15%.

9. The rate of duty payable under Bylaw 8530085 was 2%.

10. Each of the said goods had a dry linen capacity of less than 10kg/batch.

11. Duty paid on the said goods was $902.99.

12. Duty payable on the said goods is calculated to be $6773.10. ie 15% NOT FACTS

13. Duty remaining on the said goods is calculated to be $5870.11. 13%

These are therefore to command you in Her Majesty's name, to be and appear on MONDAY the TWENTY SECOND day of JULY 1991 at two of the clock in the afternoon at the Local Court at St James Centre, 111 Elizabeth Street, Sydney in the said State, before such Magistrate for the said State, as may then be there, to answer to the said information and to be further dealt with according to law.

GIVEN under my Hand and Seal this 24th day of JUNE in the year of Our Lord one thousand nine hundred and NINETY ONE at Sydney in the said State.

Justice of the Peace in and for the State of New South Wales.

SEAL

FOR FURTHER INFORMATION CONTACT: GREG C
ON TELEPHONE NUMBER: 226 5868

We say
(i) diff[illegible] laundry-[illegible] [illegible]
(ii) if not, does have LLC, using outer cylinder.
Our machines are not [illegible].

We have [illegible] copy, they [illegible], which [illegible] intended 'cylinder' to mean the outer cylinder.

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11th May, 2000

Dr. J. Nation & Mr. D. Hunt
Advisers to the Minister for Justice & Customs
Parliament House
CANBERRA A.C.T. 2600

Dear Sirs,

Re: Neil Pearson

Thank you for the courtesy of the interview in the office of Mrs. Danna Vale M.P. today. A considerable amount of detail was covered and it is appropriate that it be summarised in outline while it is still fresh in our memories.

The following is my recollection of what emerged from our discussions in "dot point" form. I believe that I was able to correct many misconceptions:

- Pearson was convicted without any evidence to prove that his Customs agent had wrongly entered the subject washer extractors;
- Pearson relied solely on the expert advice of his Customs Agent who has not been prosecuted;
- There were many other importers of similar machines throughout Australia but no other has been convicted. In N.S.W., the only other importer was Tavemar Pty. Ltd. who was prosecuted. In a differently conducted hearing where there was no attempt to prevent the importer from leading evidence, all charges were dismissed on the same points as Pearson was convicted on;
- A senior Customs Officer has acknowledged that the Tariff Concession Order on which all machines were entered was worded in an "administratively unacceptable" way and was ambiguous. He cancelled the Concession Order and re-issued it but did not back-date it far enough to catch Pearson's first six shipments. All subsequent shipments have been entered at the same rate of duty as the 6 that were prosecuted (namely 2% and not 15%) with Customs' concurrence;
- Section 269C of the *Customs Act, 1901* as it then was, made it mandatory for Customs to created a Concession Order for the first 6 shipments also but this was not done;

- Pearson was prevented from leading evidence of innocence by Customs' submissions that he was "precluded" from leading exculpatory evidence; these submissions were erroneously upheld in the hearings;
- The Court of Criminal Appeal unanimously directed Hosking DCJ in the District Court that there was no "preclusive effect" or any other reason why Pearson should not have a "hearing on the merits" nor was there any evidence on which Pearson could be convicted unless a suitable averment could be formulated;
- Customs were unable to formulate an effective averment;
- Proceedings in the Court of Appeal and the High Court were limited to a claim for remedies for a denial of natural justice and procedural fairness; they were not relevant to a "hearing on the merits";
- Pearson applied for a review of the convictions by the Supreme Court under provisions in the *Crimes Act*.
- Wood C.J. at C.L., **acting in a non-judicial manner** as required by the legislation, reviewed, intermittently over a period of 15 months, material put before him and decided, without the benefit of argument, that it was not appropriate to forward the matter to the Court of Criminal Appeal to be treated as an appeal. His reasons have been described as "powerful" but are, in fact, riddled with errors;
- The decision of Wood C.J. at C.L. is obviously wrong for various reason previously supplied but, in particular, Paragraph 60;
- Pearson attempted to "appeal" the decision of Wood C.J. at C.L. by way of *mandamus* but Customs threatened to lodge numerous technical appeals not related to the merits of the matter if the appeal was to proceed (a copy of Court document evidencing this was provided);
- Customs made little attempt to hide the fact that the purpose of their threatened actions was to impose a financial burden beyond Pearson's reach. Pearson's counsel advised that it would be necessary to brief Senior Counsel to deal with the technical objections and that Pearson's financial exposure would be between $50,000 and $200,000;
- Pearson was forced to abandon the application for *mandamus* as he could not match the financial resources of the Commonwealth;

Not only has Customs pursued a course of action contrary to the principle applicable to prosecutors but they have seriously breached the policy of the "Crown as a model litigant". Advice from the Australian Government Solicitor to the contrary cannot be accepted in view of the letter from describing the attitude of two of its legal officers which compromises the position of the Australian Government Solicitor in all respects.

Pearson does not seek any interference with the judicial process but simply seeks assurances that the Commonwealth's superior financial position be not again used to thwart "a hearing on the merits" by the Court of Criminal Appeal. In view of the outrageous past actions, Pearson would also appreciate an

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acknowledgment that it is desirable that this long running problem be resolved by a hearing on the merits in the Court of Criminal Appeal.

We also discussed the jurisdiction of the Minister to intervene in this matter. I informed you that it was my understanding of the current concept of "Ministerial Responsibility" that, while this had been reduced in recent years, once the Minister was aware of malpractices in his/her area of responsibility, there was a power and a duty to intervene. In any case, the Attorney-General had such power and should be requested to intervene to the extent that it is necessary to intervene to prevent further abuses aimed at denying Pearson his right to access to the Courts.

The possibility of an alternative solution by way of pardon was briefly mentioned. This may well be a compromise solution provided an ex-gratia payment which included the penalties and costs already paid was available.

Please proceed along the lines that you mentioned with some haste since others are rallying to Pearson's aid in a somewhat uncoordinated way.

I also produced press clippings to support the view that Customs had failed to eradicate the undesirable "culture" identified in the Senate Enquiry into the Midford Paramount affair.

Yours faithfully

R.J.Benson
Solicitor

cc Mrs. D. Vale
Richard Liu
Neil Pearson
Ray Katte

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TARIFF CLASSIFICATION OF "MAYTAG A 512" LAUNDRY MACHINES

The following is a simplified approach to one facet of the long-running debate as to the correct amount of customs duty payable on "Maytag A512" machines; it is sufficient, alone, to resolve the debate without resorting to alternative arguments. The full submission on this matter has proved too long and too complex even for persons such as Justice Wood who, over an 18 month period, managed to confuse some fundamental facts and esoteric parts of the law.

It has never been in dispute that the "Maytag A512" machines fell within Item 84.40 in Schedule 3 to the *Customs Tariff Act, 1982* but the question of which Sub-item within 84.40 is relevant is in question. Annexure "A" hereto sets out Item 84.40 together with all of its Sub-items.

The Administrative Appeals Tribunal described the machines in question as being:

> *"designed and structured for commercial activity, and are of the commercial type, although they may be used by households."*

The "Maytag A512" may be described in a little more detail as being known in the trade as a commercial washer-extractor similar to the "Speed Queen" but being towards the lower end of the commercial scale in size and having some superficial similarity to domestic machines. Closer inspection, however, reveals many significant differences; the machines are bigger, heavier and differently designed so as to withstand commercial rigors which would quickly destroy a domestic machine. This was demonstrated in a trial which destroyed a "Simpson" machine in 6 months. This compares with Maytags still functioning in laundromats after 18 years. The control panel is also quite different being confined, for simplicity, to very few basic controls as against vastly more which are a feature in domestic machines.

The Maytag A512 is designed for laundromats, caravan parks, army barracks, small hospitals etc. About the time that the Customs enquiry was undertaken, the quality of domestic machines had fallen to an abysmal low and some purchasers, aware of the quality problem, were prepared to pay about 2 ½ times the price of a domestic machine to get a reliable commercial machine. It is now clear that Email, the largest domestic manufacturer, complained of potential loss of market to Customs who took extreme but ill founded action which culminated when an officer and an Email employee admitted that they had given perjured evidence against the commercial machines.

It is true that the Maytag A512 was sometimes advertised as being "domestic with commercial reliability" but this is irrelevant to Tariff Classification . As was said by Brennan J. and affirmed by others: "*Identification is concerned with goods and not the description of goods.*"

Judicial Comment – Commercial or Domestic ?

In the Federal Court, Wilcox J. said:

> *"Counsel say that it is necessary to determine the essential character of the goods. That is a matter to be determined objectively, by looking at the nature of the goods, including their get-up and general presentation..... .....*
>
> *By way of alternative submission, counsel rely upon the 'more than' test..... .....*
>
> *The general principle concerning the classification of goods for the purposes of fixing the appropriate customs tariff was stated by Lockhart J. in Chinese Food & Wine..... ..... In Times Consultants Pty. Limited v Collector of Customs (1987) 76 ALR 313 at 317, Morling J. and I put the matter in similar terms:*
>
> > *'The authorities make it clear that in determining what is the essential character of goods it is the state or condition of the goods at the time of importation that is the determining factor and that it is wrong to classify goods or to determine their essential character by reference to the purpose of the importer or of the purchaser Regard must be had to the characteristics of the goods themselves, as they would present themselves to an informed observer.'*

Wilcox J. concluded that Tariff Sub-item 84.40.1 could not apply to the machines i.e. they were of the commercial and not domestic type and that decision has not been subsequently challenged.

Sub-item 84.40.2 or Sub-item 84.40.9 ?

The Federal Court was not asked to decide which of these two Sub-items applied to the "Maytag A 512" machines and the question subsequently arose from findings of fact made by the Full Federal Court. Those findings of fact are summarised hereunder:

> *"We are satisfied that the machine is not to be regarded as*

> *primarily a washing machine with the additional optional function of spin-drying. In our opinion it falls within the meaning of the term 'washer extractor' appearing in the Tariff Concession Order."* (Pages 4/5)

Having not heard argument on these findings of fact and their application to Sub-item 84.40.9 and noting that the TC 8530085 did include reference to washer extractors, it is understandable that the Full Court added the last six (6) words to the above extract from their reasons for decision. However, a Tariff Concession Order, being either delegated or subordinate legislation, cannot vary the provisions of any *Customs Tariff Act* so the erroneous inclusion of the reference to "washer extractors" by the departmental draftsman cannot vary the true classification of the machines. These last words in the above paragraph of the Full Court's reasons, being *per incuriam*, should be ignored; they are irrelevant to the question regarding Sub-item 84.40.9 anyway.

Later, the Full Federal Court reinforced its opinion that the machines were more than washing machines when it said:

> *"The machine, as a washer extractor, receives the load for the purposes not only of washing it but also of spin-drying it."* (Page 7)

It follows that the machines cannot be identified as mere washing machines as they are "more than" such machines. The relevance of the "More Than Rule" was mentioned by Wilcox J. in passing (see above) but the well established rule is set out with many authorities in Annexure "B" attached.

Machines falling within Sub-item 84.40.2 are described with particularity within that Sub-item. The only reference requiring consideration is Paragraph (c (viii) which reads as follows:

> *(viii) Washing or cleaning machines*

The disjunctive "*or*" means that two separate types of machine are intended to be covered by Paragraph (viii). For reasons already given, the machines in question are "more than" washing machines and, therefore, cannot be identified as washing machines. It has been suggested that, even though they are not covered by the description "washing machines", they may be covered by "or cleaning machines". This alternative can be quickly dismissed; firstly, all laundry machines are cleaning machines of one type or another but, more specifically, the preamble to Paragraph (c makes it clear that the second part of the reference is to "dry-cleaning machines" which are not mentioned elsewhere in the Sub-item. The argument has been submitted to some judges and quickly dismissed.

It follows that "Maytag A 512" machines did not fall in Sub-item 84.40.2 (nor in Sub-item 84.40.1) so they must default to the residual Sub-item 84.40.9 as there are no other Sub-items within Item 84.40.

When the matter went to the Court of Criminal Appeal, the Court noted that there was "a dearth of evidence" (Page 34) to discharge the onus of proof born by the prosecution that the machines did not fall within Sub-item 84.40.9 but left it open to the prosecution to repair this defect in its case by amending its averments when the matter went back to the trial judge. Before the trial Judge, the prosecution attempted, unsuccessfully, to amend its averments as regards capacity but did not even attempt to amend for the purposes of Sub-item 84.40.9 even though on notice of the new issue, probably for the simple reason that such a classification is obviously correct.

A Decisive Point

The history of Tariff Item 84.40 confirms that Sub-item 84.40.9 is clearly the correct classification of the "Maytag A 512" machines. Between 1980 and 1982 Paragraph 84.40.22 was as follows:

> *"Washing machines, including washing machines incorporating or combined with clothes drying machines……."*

By Act No. 113 of 1982, Paragraph 84.40.22 was repealed and a new Paragraph 84.40.11 was inserted. The new paragraph read:

> *"Laundry machines, including washing machines incorporating or combined with clothes drying machines……."*

By Act No. 32 of 1983, Sub-item 84.40.2 was inserted and was substantially the same as Sub-item 84.40.2 as it was at the time that Pearson's machines were entered for Customs purposes: that is, that the Sub-item no longer extended to machines incorporating a drying function.

The basic point revealed by this history is that the legislature (the *Customs Tariff Act* is an Act of the federal Parliament) was aware that some commercial washing machines were capable of both washing and drying and provision was, for a time, made for such machines which were "more than" mere washing machines. When the provision for dual purpose machines (known as "washer extractors" in the trade) was removed in 1983, it must be presumed that it was done consciously and the intention was to remove dual purpose machines from Sub-item 84.40.2. This is a basic principle of legal interpretation – see, for example, *Pearlberg v Varty* [1971] 1 WLR 728 and *Scott v Commercial Hotel Merbein Pty. Ltd.* [1930] VLR 25 at 30.

Removal of dual purpose machines from Sub-item 84.40.2 was not accompanied by a specific alternate classification. The machines, therefore, fall to the residual Sub-item 84.40.9.

There can be no question but that the Maytag A 512 is a dual purpose commercial machine which washes and is incorporated with or is combined with a spin drier. It is "more than" a washing machine and is excluded from Sub-item 84.40.2 for the reasons given above. It is classified in Sub-item 84.40.9 which, at the relevant time, attracted duty at the rate of 2% which was the rate at which Pearson's agent entered the goods; there can be no evasion of duty if the correct rate of duty was paid for whatever reason.

There are other reasons why the correct rate of duty was paid and no offences committed. Perusal of file C85/30085 shows that the machines were eligible, in any case, for concessional entry on the basis of being commercial which is now beyond dispute. At the relevant time, Section 269C (1) of the *Customs Act, 1901* made it mandatory that the Comptroller create a Concessional Order which was attempted (TC 8636141was published) but a departmental failure to properly advertise the Order rendered it technically invalid as explained to the Administrative Appeals Tribunal. Pearson should not be punished for a failure by the Comptroller's staff.

TC 8636141 was subsequently validated by the issue of a new TCO but, because of the introduction of the "Harmonised Tariff" operative from 1st January, 1988, the new TCO could not be back dated beyond that point in time. The result is that identical machines entered for Customs purposes after that date are unquestionably dutiable at the rate of 2% but Customs assert that machines entered before that date were dutiable at 15%.; an untenable proposition.

PREJUDICE & MALPRACTICE IN THE PEARSON PROSECUTIONS

It will be seen that extreme prejudice has been leveled at both Pearson and his solicitor (Reg Benson). The reasons are relatively clear viz:

1. Pearson, in successfully challenging the (illegal) attempt by Customs to have the smaller commercial laundry machines identified as "domestic", had to be punished in accordance with the prevailing culture; and

2. In successfully defending Pearson, Benson was seen as a "whistleblower" and traitor to Customs for reasons which will appear later. Attempts to denigrate his skill and expertise in Customs Law have also been made and are also answered below.

There is no room for doubt that Pearson was wrongly convicted. The admission by Hosking DCJ alone that he did not change any part of his proposed reasons for decision after the detailed decision of the Court of Criminal Appeal extending over 37 pages which rejected basic parts of his reasons and the failed attempt to amend averments are alone sufficient to demonstrate this fact but there is an abundance of other material to elaborate on this point.

An application was made to the Supreme Court of N.S.W. for review of the convictions pursuant to Section 474D of the *Crimes Act, 1900*. This was first considered by Wood C.J. at C.L. who made a number of errors including the fundamental one in his Paragraph 60 which acknowledged that there was no evidence on which convictions could be recorded but for an amendment of Averment 6 in the informations. It is abundantly clear from

the transcript that no amendment was effectively made and an error which was so apparent calls for explanations.

The explanations for the errors of Wood C.J. at C.L. emerged later with the discovery of the letter dated 31st January, 2002 from the Australian Government Solicitor's office. Paragraph 3 of that letter alleges that "In all, 19 judicial officers have been involved in making determinations about the applicant's washing machines (sic). Each court has found against the case proposed by the applicant's solicitor...". This is a grossly untrue allegation; there have never been anything like 19 "judicial officers" involved and of those actually involved, only the Magistrate at first instance and Hosking DCJ found against Pearson "in court".

It is now clear that similar letters equally untrue and misleading have been submitted by officers in the Australian Government Solicitor's office and that the author of the letter is following the line established by the other Customs' solicitors mentioned in the document which is annexed to this opening Summary or Outline and immediately follows it.

Copies of the letter of 31st January, 2002 and related correspondence are in Annexure "8".

It is also significant that, during the lengthy pursuit of justice by Pearson, those representing Customs have never attempted to point to any evidence which would render convictions lawful although repeatedly challenged to do so.

The antagonism to Pearson, his machines and similar machines imported by others is evident but documents being contemporary notes taken from time to time elaborate on the problem. Copies are in Annexure "7". Page 7 of the document **CUSTOMS v COMMERCIAL LAUNDRY MACHINES"** has been referred to above as summarizing why prosecutions were inappropriate. Another document entitled "**CUSTOMS v PEARSON**" included in Annexure "7" is also informative.

Attempts have been made to denigrate Pearson's solicitor (Benson) on various grounds including a quite improper allegation made in open court but unsupported by any evidence, that he had altered the Stated Case signed by Hosking DCJ. Such conduct by the lawyers representing Customs was sufficient, in the case of *Clyne v N.S.W. Bar Association* (1960) 104 CLR 186, to have the offending practitioner struck off the roll of practitioners. The allegations were maintained purely on the basis that "attack is the best

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means of defence" and were clearly intended to prejudice the Court of Criminal Appeal which was about the hear the case stated by Hosking DCJ. Other than finally exonerating Pearson's solicitor, no finality has been reached on the conduct of the Customs' lawyers but the document a copy of which immediately follows this summary explains the mala fides and the attempt to suborn another solicitor.

Discussions between ex-officers discloses that all are regarded by their former colleagues as pariahs and treated accordingly. The treatment meted out to Benson on this ground is consistent with that applied to others but is more extreme because of his success in other matters. The accusation that he is a "whistleblower" is false and the truth is that he was directed in writing jointly by the Attorney-General and the C.E.O. of Customs to write a report based on his own experience on where revenue may be lost. The report extended over 100 pages and made 45 recommendations for improvement. The recommendations were examined by a committee of Customs Officers and others and all but 3 of the recommendations were endorsed.

Annexure "10" is an extract from the book "Contraband & Controversy" by Dr. David day who was commissioned by Customs to write this book.

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CUSTOMS v COMMERCIAL LAUNDRY MACHINES

Background

The Tariff Concession area in Customs has been making concessional instruments for the smaller industrial laundry machines (both washing machines and washer extractors) as far back as 1980 and earlier. The Customs Investigation Section has relentlessly pursued ("persecuted") the importers of such machinery who utilise these concessions for almost as long despite regular rebuffs in the Administrative Appeals Tribunal (the "A.A.T.) and the Federal Court which bring about temporary pauses.

There has been a succession of concessional instruments replacing earlier instruments varying only slightly from their predecessors. Many of these instruments refer to "dry linen capacity" and/or "cylinder capacity" and, in respect of the Tariff Concession order central to this matter (TC 8530085) a "deeming" note provides that dry linen capacity shall be calculated from the "volumetric cylinder capacity" of the "cylinder". This creates a latent ambiguity in that, while commercial washing machines have only one cylinder, washer-extractors have two namely, the outer cylinder which corresponds to the only cylinder in washing machines and an inner cylinder (known as the "basket") which plays no part in the washing process but is used in the spin-drying cycle. A copy of TC 8530085 is attached hereto.

A copy of the Customs' file on which TC 8530085 was created was obtained under Freedom of Information provisions and shows that it was the intention of the draftsman of the Order that the **outer** cylinder should be relevant for the purposes of the deeming note.

On 30/7/82, Customs, Brisbane ruled that the **outer** cylinder in washer-extractors was the relevant cylinder when determining cylinder capacity. This logical approach gives consistency when compared with commercial washing machines and accords with the understanding of the industrial laundry industry and manufactures of laundry machines. However, the latter, recognising the vagueness of the term "dry linen capacity" tries to avoid the use of the term..

Customs then raised issue as to whether "Maytag" and "Speed Queen" machine are commercial or domestic. In 1982 the issue went to the A.A.T. but Customs lost and their arguments were rejected.

Customs tried again in 1983 (*Re: Lee Mckeand* (1983) 5 ALD 613) and lost again.

Customs in Melbourne then argued that small **coin**-operated machines are domestic (a bizarre idea) but later conceded that they were wrong when the matter was taken to the A.A.T. on an application for review.

In 1987, Customs carried out raids on all importers of "Maytag" and "Speed Queen" machines around Australia. Machines were seized in Queensland, New South Wales, Victoria and South Australia. Prosecutions were commenced but did not proceed to hearing except in New South Wales where Tavemar Pty. Ltd. ("Speed Queen") and

Neil Pearson & Co. P/L ("Maytag") were prosecuted. The prosecution of Tavemar Pty. Ltd. proceeded on orthodox lines and Customs lost - all charges were dismissed. A significant event during the prosecution of Tavemar Pty. Ltd. was the manner in which Customs presented their evidence in the vital aspect of the "volumetric cylinder capacity" of the machines. A Customs officer gave evidence that he had taken the cylinder from a "Speed Queen" machine and had given it to an employee of Email Ltd., a perceived competitor of "Speed Queen". An employee of Email Ltd. then gave evidence that he had measured the capacity of the cylinder and found that it was less than the critical 100 litres. During a recess in the hearing, representatives of Tavemar Pty. Ltd. examined the cylinder and discovered that it was not a genuine part. The Customs Officer was then recalled and admitted that the cylinder was actually from a "Kleen Maid" machine which he said was "similar". However, the similarity did not extend to volumetric capacity and the genuine "Speed Queen" cylinder was significantly bigger and exceeded the critical 100 litres. Complaint at this apparent perjury was made to two senior Customs Officers who promised that their Internal Affairs Section would investigate the irregularity but this was never done despite follow-up reminders.

Prosecution of Pearson was conducted on an artificial basis relying on perceived technicalities accepted by the Magistrate and District Court Judge (Hosking DCJ) but overturned by the Court of Criminal Appeal. Litigation is still continuing at great cost to all primarily because Hosking DCJ declined to follow the instructions of the Court of Criminal Appeal.

Pearson

Pearson commenced to import "Maytag" machines about 1986. He contacted Ray Katte of Cridland Katte Customs Agency; Mr. Katte is held in the highest esteem by all and is a Past President of the agent's Association. Katte asked Pearson to measure the capacity of the outside cylinder and, when told it was in excess of 100 litres, Katte advised his client that "Maytag" Model A512 machines were eligible for concessional entry under TC 8530085 which made them entitled to a rate of duty of 2%. TC8636141 which was published by Customs as current at that time would also have given the same result but had, unknown to the public, been invalidly created because of an error in the Customs Head Office.

In 1987, Katte became aware that Customs were again agitating the concessional issue so he wrote to Customs in Canberra explaining his client's position and seeking rulings. Letters dated 12/10/87, 30/1/88, 3/5/88 and 17/1/89 produced few responses and no rulings. By letter dated 17/1/89, Customs Officer Higgins advised that he recognised a problem but had no solutions.

When Pearson was raided along with all other importers, Katte advised him to resort to the A.A.T., primarily on the commercial/domestic issue but Customs keep adding new grounds in the face of submissions that they are wrong. Customs also advised that TC8636141 which would also result in concessional duty at the rate of 2% was invalidly created by Customs' own fault but Pearson was told he could not rely on it. In the face of criticism, Customs promised to validate the concession order but were so tardy in doing so that a new Customs Tariff was introduced which limited the

extent of retrospective operation of the validated Order thus excluded Pearson's first six shipments.. Pearson did receive refunds of duty based on a 2% rate of duty for imports of identical machines made after 1st January, 1988 and was prosecuted for the first six shipments of identical machines.

The dispute (now on various grounds) was heard in the Administrative Appeals Tribunal before D.P. Bannon sitting alone. The A.A.T. ruled against Pearson on the commercial/domestic issue and made other findings of fact especially as to the relevant cylinder for the purposes of TC8530085. It did this without receiving evidence or hearing submissions from either side or even advising the parties that it was making its own enquiries. Section 33 of the Administrative Appeals Tribunal Act permits such informal enquiries but the Court of Criminal Appeal has ruled that such findings are not admissible in criminal prosecutions such as followed in Pearson's case. However, the Tribunal also held that, had TC8636141 been validly created, it would have applied that concession so as to find in favour of Pearson.

Pearson appealed to the Federal Court on **questions of law** and Wilcox J. found in favour of Pearson on all such points. The A.A.T. opinion regarding the relevant cylinder was not disturbed as the Court had no jurisdiction to deal with facts. Unfortunately, Wilcox J. made comments on the facts found below despite his lack of jurisdiction to find facts or evidence on which a positive finding might be made. Customs have sought to rely on these observations made without access to evidence. Subsequently, the Court of Criminal Appeal has directed Hosking DCJ not to apply these facts in the Pearson prosecution but His Honour declined to follow the directions of the superior court and Section 146 of the Justices Act (N.S.W.) prohibits a direct appeal from such illegal conduct. An example of such a direction is found on Pages 23/24 of the Court of Criminal Appeal's directions where it is said:

> *"However, Hosking DCJ was perfectly entitled to follow the decisions **so long as he appreciated the different evidentiary environment in which the Federal Court judges reached their conclusions."** (emphasis added)*

See also the Annexure hereto which sets out other comments by the Superior Court on the relevance of the comments below.

On appeal to the Full Federal Court, Wilcox J's decision was affirmed based on the facts found by the A.A.T. but the selection of the relevant cylinder, being a question of fact, again could not be disturbed in that Court. **However, Wilcox J. had provided a legal formula to identify the relevant cylinder which then needed factual evidence to be applied. The Federal Court had no jurisdiction to make findings of fact so was unable to take the issue to finality.**

The Full Federal Court also expressed the opinion that the machines were **"washer-extractors" which identification would result in the machines being entered at the correct rate of duty (2%) under Tariff Sub-item 84.40.9 but, again, had no jurisdiction to so rule.**

The Prosecution of Pearson

The basis of the Customs prosecution of Pearson is that his Licensed Customs Agent selected the wrong cylinder in machines which are clearly "washer extractors" (i.e. they have two (2) cylinders as previously described). The inner cylinder is of a capacity less than the volume required by TC 8530085 but the outer cylinder is in excess of this volume. Customs have led no admissibile evidence to prove, as a fact which is the relevant cylinder and have, so far, been able to prevent Pearson from leading the abundance of evidence to show that his agent chose correctly. This is contrary to all prosecution principles.

The Customs' case also completely ignores the alternate defence available to Pearson (especially in view of an opinion expressed by the Full Federal Court) that the machines are "washer extractors" dutiable at the rate of 2% anyway.

As previously noted, Customs commenced prosecution of both Mr. Pearson and his company in the Local Court with multiple charges for each of six shipments. The prosecutions were contrary to the provisions of the "Prosecution Policy of the Commonwealth". The prosecution deliberately led no evidence of incorrect entry but successfully ran the technical argument that the decisions of the Federal Court were decisions in rem which **precluded** the Defendants from leading exculpatory evidence (then available - a Mr. G. Lindsay was actually sworn as an expert witness but was not allowed to give evidence over technical objections as to relevance taken by Customs). The expert evidence of Mr. Lindsay and others who would have followed him would have shown that Mr Katte had selected the correct cylinder and correctly entered the goods. The Magistrate upheld these Prosecution submissions over objection and convicted both parties on all charges imposing heavy penalties. The Defendants appealed de novo to the District Court.

The appeal came before Hosking DCJ where the same submissions were upheld. The Defendants appealed by way of Stated Case to the Court of Criminal Appeal which, in a lengthy and detailed judgement found that Hosking DCJ had erred and, in any case, was "faced with a dearth of evidence" . Conviction in those circumstances would not seem open. The Court of Criminal Appeal did leave open the possibility that the prosecution might be able to repair its case if it could suitably amend its averments. The Court also held that Hosking DCJ could follow the decision of the Federal Court if he wished provided that he appreciated the "evidentiary environment" in which the Federal Court found itself but, as that Court had made no finding of fact and had to rely on the findings in the Tribunal which were not admissible in the prosecution, he would obviously need to hear the evidence which the Prosecution had previously declined to lead. If cogent evidence was admitted then an obligation arose to permit the defendants to lead contrary evidence which the Defendants had been trying to lead for so long to reach a concluded view as to the correct cylinder. Even then, he would be left with a lack of evidence as to whether the machines were "washer-extractors" dutiable at 2% under Sub-item 84.40.9 in the Customs Tariff in any case.

During the hearing before Hosking DCJ, a senior Customs Officer told a Customs Agent that the prosecution of Pearson was being maintained because he had won the commercial/domestic issue which had, once again, defeated their plans. Later, an even more senior Customs Officer made similar remarks thus indicating mala fides. About this time, Pearson's solicitor asked the solicitor for Customs why these

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seemingly reprehensible tactics were being adopted contrary to the Crown's position as "the fountain of justice" and contrary to ordinary prosecution ethics. He was informed in plain language that the Australian Government Solicitor's Office was in the process of being "privatised" and this meant that its clients would be free to choose their own solicitor. Unless the client was given everything that it wanted, they would go elsewhere and jobs would be lost. In these circumstances, the previous policy of guarding against injustice had ceased to apply.

When the matter went back to Hosking DCJ, his Honour allowed Customs to re-open their defective case to try to repair it with amended averments. However, the amendments able to be made were ineffective and the essential part, being an averment of law, was eventually abandoned by the Prosecution.

Hosking DCJ then refused to hear submissions from counsel for the Defendants as to why the decision of the Court of Criminal Appeal required him to dismiss the charges and also refused to allow the Defence to re-open its case to lead the evidence that it had always wanted to lead and had been wrongly prevented as the Appeal Court had found. The provisions of the Justices Act (NSW) preclude an appeal in such circumstances but counsel for the Defendants advised that there was a procedure for review provided that all other possible forms of appeal had first been exhausted.

The Defendants then sought an order in the nature of certiorari against Hosking DCJ on the basis of a lack of procedural fairness. In preparing its case guided by counsel, English authority was adopted which resulted in a voluminous affidavit and several more succinct ones being filed. This did not find favour with the Court of Appeal which proceeded to strike out all of the Defendants affidavits and proceeded to summary judgement against the defendants without reading the relevant evidence. Any comments made by this Court as to guilt or liability to duty were, therefore, purely gratuitous, per incuriam and of no consequence.

Pearson then appealed to the High Court being conscious of the difficulty in obtaining Special Leave but needing to exhaust all avenues of appeal before seeking review by the Supreme Court. Because of the need for a succinct submission to the High Court, only a very narrow but seemingly compelling issue was raised. Prior to the application being heard, Toohey J. explained to all present in Court that the High Court only had the capacity to hear about 100 cases per year and must therefore only give leave in exceptional cases. In hearing the application, Gaudron J. clearly identified the injustice done to Pearson but, by a majority of 2 to 1, special leave was refused.

Because of the horrendous costs being incurred by each side, the solicitor for Pearson has been trying to negotiate an informal means of settlement; one suggestion was that the matter should be remitted by consent to the District Court to be dealt with according to law (after Hosking DCJ had been given the benefit of submissions on the effects of the decision of the Court of Criminal Appeal). However, Customs, which has an inexhaustible source of funds remained recalcitrant and seemed bent on grinding Pearson into submission by sheer weight of superior money resources

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Having complied with the requirement to exhaust all apparently available forms of appeal, Pearson has applied to The Supreme Court of N.S.W. for review of the convictions pursuant to Section 474D of the Crimes Act, 1900 (N.S.W.). The matter is in the hands of Wood C.J. at C.L. who obviously considers this an appropriate matter to be referred to the Court of Criminal Appeal to be dealt with as an appeal. However, Customs have objected on the highly technical grounds that, in deciding that this is an appropriate case for review, Wood C.J. at C.L. is acting ministerially (seemingly in much the same way as a Magistrate who commits a person for trial for a federal offence) and this is constitutionally unsound under the separation of powers doctrine. Highly technical submissions have been made over two days of hearing and Customs have persuaded the Attorney-General for New South Wales to assist them despite an earlier decline by the State. Written submissions have followed the hearing days and considerable cost to all parties are being incurred.

Prior to the incurring of significant legal costs by all parties, another approach was made to Customs seeking a neutral approach to the constitutional question. This would leave Pearson with a burden of convincing the Court of its jurisdiction with opposition. In support of this approach, an opinion was obtained from Mr. R. Parker Q.C. stating that Pearson was innocent and that a miscarriage of justice had apparently occurred. As new counsel in this matter said, "this is not a big ask" since Pearson would still carry the onus of proof of jurisdiction and then the onus of prosecutiing the resultant appeal which would simply be the "hearing on the merits" which Customs tactics had so far denied the Defendants. It was suggested that this was an honourable and expeditious means of bringing to an end a matter that had been in issue for ten years and was likely to continue until Pearson received the hearing on the merits that he was entitled to. Customs, acting on the advice of in the Australian Government Solicitor's Office, declined even this small concession and further legal costs were incurred.

Subsequently, it has emerged that, by his own admission, was not familiar with the facts, had no understanding of the specialist legal principles associated with Customs Tariff cases, took note of a decision which had no authoritative bearing on guilt or innocence and completely ignored the authoritative decision of the Court of Criminal Appeal. Despite these handicaps, he was able to advise Customs that an eminent Queen's Counsel was wrong and Customs accepted his advice.

The issue raised by Customs might be thought to be of some merit by a Constitutional academic but its technicalities have been recognised by the Commonwealth Director of Public Prosecutions who, on several occasions, has declined to take the point.

Summary

(1) Pearson has consistently been denied a "hearing on the merits" which is his right in any of the courts that have dealt with the matter. Customs are currently trying to prevent a hearing on the merits in the Supreme Court by raising a technical objection. The forthcoming action for return of seized goods presents another opportunity for a hearing on the merits but the solicitor acting for Customs has again writen to say that

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technical objections to this will again be taken; he has both threatened and cajoled the Defendants to forego this avenue of review. Such a sustained and determination to avoid a hearing on the merits can only be interpreted as a consciousness that the Customs case is flawed and Pearson is innocent. This amounts to an attempt to pervert the course of Justice;

(2) Taken on the merits and correctly applying the decision of the Court of Criminal Appeal, the Prosecution must fail because:

(a) it deliberately led no evidence that the goods were not correctly entered - the failed prosecution of Tavemar confirms that no such evidence exists;

(b) there is an abundance of expert evidence available to prove conclusively that the machines were correctly entered and no offences were committed but Customs have so far managed to prevent this evidence from being led - Gaudron J. at least, recognised the denial of natural justice;

(3) Even if the Customs Agent's advice to Pearson was wrong, there should have been no prosecution because:

(a) Customs were unable to interpret their own document and at times reached the same conclusion as the Agent;

(b) The GATT Agreement (to which Australia is a signatory) provides that no penalties should apply in such cases;

(c) The "Prosecution Policy of the Commonwealth" says no prosecution should occur;

(d) The Federal Court has held that no administrative penalties should be imposed in such cases;

(e) Prosecutions in other States did not proceed and seized goods were returned;

(f) The prosecution of Tavemar Pty. Ltd. which, unlike Pearson, was conducted "on the merits" and without the artificiality of the now discredited "decision in rem having preclusive effect" submission resulted in dismissal of all charges.

(4) There are strong indications that the prosecutions were initiated and maintained for improper reasons including mala fides;

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(5) The technical objections now being raised to try to prevent review by the Supreme Court of New South Wales are:

(a) Contrary to observations made by the Commonwealth Ombudsman in his Annual Report for 1989/1990 (at Page 41);

(b) Evidence of determined desperation not to have the matter reviewed at any price. This includes a consciousness of past improper actions and a wrong result;

(c) An example of Customs using the superior financial resources of the Commonwealth to "grind" Pearson into submission.

The above lends weight to the conclusion drawn from what was said by Senior Customs Officers. This was a malicious prosecution to punish Pearson for once again defeating the Customs' attempt to overturn previous rulings on commercial/domestic. It is entirely consistent with a recent newspaper report that the reform of Customs following the Midford Paramount enquiry by the Senate had failed (copy attached).

- Having exhausted all other available avenues of appeal (albeit not on the merits) the way seemed open to seek a merit review through Section 474D of the *Crimes Act, 1900*. However, Customs elected to challenge the jurisdiction of the Supreme Court on highly technical grounds having no relation to the merits. Considerable costs were going to be involved so Pearson, who was by now aware of the animus directed to his solicitor by decided to instruct a new solicitor who, in turn instructed Mr. R. Parker Q.C. to advise on the merits. Mr. Parker who is a very senior and eminent counsel with experience in Customs tariff issues at all levels and having no prior contact with this dispute, came to the conclusion that a miscarriage of justice had occurred and pointed to an admission by Hosking DCJ that he had failed to comply with directions given to him by the Court of Criminal Appeal. This opinion was submitted to Customs to support a plea for the matter to be allowed to go through to be considered on its merits and thus save considerable costs on each side. in the Australian Government Solicitor's Office took it on himself to advise senior Customs Officers that Mr. Parker Q.C. was wrong; this is somewhat breathtaking coming unsupported from a solicitor with no experience in Customs tariff issues. Subsequently, had written a detailed letter in which his ignorance of Tariff is manifest.

- As Customs persisted with their attack on the jurisdiction of the Supreme Court the matter was argued before Wood C.J. at C.L. (at considerable expense) and His Honour finally ruled that there was jurisdiction and the Customs' submissions were rejected with costs.

- Wood C.J. at C.L. considered a written application for the matter to be reviewed by the Court of Criminal Appeal. Customs supplied written submissions which were far from accurate but no opportunity was given to make oral submissions or to address any concerns that His Honour may have had in this very esoteric area of the law. After having the matter before him for well over a year Wood C.J. at C.L. handed down his decision on 30th June, 1999 to the effect that he was not persuaded that this was an appropriate case to be sent to the Court of Criminal Appeal. It is apparent from his written reasons that His Honour made many errors of law and fact stemming from the lack of opportunity to address him. Typical and fundamental of his errors is the statement at Paragraph 60 of his reasons that "*The prosecutions would therefore have failed, absent amendment of Averment 6, for lack of evidence as to the dry linen capacity of the machines, this being the critical issue upon which the falseness of the entry turned.*" As previously noted, the

Prosecution did fail to effectively amend their Averment No. 6 as to dry linen capacity. In addition, there was no evidence to negative classification under Sub-item 84.40.9 and this also is a completed defence for Pearson.

- As a result of the many apparent errors in the reasons of Wood C.J. at C.L., a "holding" appeal has been filed reserving the right to file a formal appeal within 60 days. Customs have filed a Notice of Motion which seems to be at least premature but has indicated that a wide variety of abstract issues will be contested none of which goes to the merits of the convictions as well as an appeal (out of time) from the decision of Wood C.J. at C.L. regarding jurisdiction. Properly litigated, such issues could involve costs to both sides of up to $50,000.00 still without addressing the merits of the case. This clearly is a tactic to further drain Pearson's finances so as to crush him into submission; it is a tactic employed far too regularly by Customs and other examples may be quoted where Commonwealth funds have been used improperly to defeat justice. A remark by counsel for Customs on the last occasion that this matter was before the Court confirms that this is the intention of the proposed new issues.

- In summary, all Pearson wants is his "day in court" where he can have a hearing on the merits and be able to call evidence of innocence. The extraordinary and expensive lengths that Customs have gone to to prevent a hearing on the merits demands an explanation especially because it so offends accepted prosecution ethics. The extreme mala fides revealed in letter (referred to below) to the Law Society is concentrated on Pearson and his solicitor but also extends to other importers and there is corroborating evidence to support claims. The tactic of using the financial esources of the Commonwealth to crush litigation opponents can also be well demonstrated.

OTHER MATTERS

There has long been evident the most intense animus coming from two solicitors in the Australian Government Solicitor's Office and a similar number of Customs Officers. These persons have gone to extraordinary lengths to avoid any hearing on the merits and it is clear that they realise that the outcome of such a hearing would favour Pearson and bring into question the vast sums of money expended. The manipulation of many times discredited complaint to the Law Society is an offence but has now brought him undone in a much more serious manner. Following his last request for his original complaint to be reconsidered, the

Law Society has called for a report by and this has revealed a quite unacceptable attitude and practises by the two solicitors. There are also allegations of an attempt to suborn a witness and perversions of the course of justice. There seems to be a wealth of corroborating evidence to support the allegations.