

# Customs, Trade and Transport Law Case Note

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## Federal Court goes crackers over product classification and warehouse licensee liabilities.

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Many importers may not be aware of how product classification is determined for taxation purposes. Further many warehouse licensees may overlook their absolute liability for customs duty for products stored within their premises. The recent Federal Court decisions of *Lansell House Pty Ltd –v– Commissioner of Taxation* [2010] FCA 329 and *Pearce –v– Coyne Management Group Pty Ltd* [2010] FCA 320 respectively provide clarification of these issues.

### *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329

#### Facts

This case concerned a dispute between the importers of a product known as Mini Ciabatte and the Commissioner of Taxation regarding the classification of said product for GST-purposes. In brief, Mini Ciabatte is a dry 'Italian Flat Bread' on which cheese or antipasto is placed. Under the relevant tax legislation whilst plain bread is a GST-free supply, crackers and biscuits are non-GST free supplies.

It was argued by the applicant that a good could not have more than one classification for GST-purposes and that given the fact that it could be a good subject to GST and exempt from GST, the latter should prevail. However, the Commissioner argued if a product is food of a kind listed in Schedule 1 of the

*A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (the "GST Act"), being a non GST-free supply, then it is an irrelevant consideration that it can also be characterised as a GST-free supply.

#### Finding on the facts

Justice Sundberg dismissed the application, finding that the applicants had not established that Mini Ciabatte is not a food of the kind listed in Item 32 of the *GST Act* because:

- the ingredients were substantially the same as that of a cracker;
- the manufacturing process was substantially the same as that of a cracker;
- the moisture content was low and similar to that of a cracker; and
- Mini Ciabatte and crackers are displayed in supermarkets as comparable products.

#### Other comments in the judgement which warrant consideration are as follows

- pursuant to Section 14ZZO of the *Taxation Administration Act 1953 (Cth)* the onus of proving that the tax assessment is excessive is on the applicant. To discharge this onus the applicant must establish that the product is not of a kind as classified by the Commissioner. The obligation is not discharged by merely suggesting that the product could be classified differently;
- in determining product classification, unless evidence of a specialist trade usage of an expression can be

established, the classification groups should be interpreted using their plain ordinary English meaning;

- the classification of a product in an international jurisdiction is irrelevant;
- it is not open for a supplier, in labelling its product, to determine the classification; and
- a court should not determine classification based on other decisions made by the Commissioner on similar products. It is a stand alone enquiry of the goods in question.

#### How is the decision relevant to importers?

- This decision clarifies (for now) the classification of the relevant product, although the issue may proceed to appeal.
- The Court has concluded that it is not relevant when classifying a good for GST purposes whether it has characteristics of more than one food type. Instead it must be established, by the applicant alleging the excessive tax assessment, that it does not have the characteristics of the relevant taxable item.
- The test applied in determining the meaning of a classification is one of common sense, applying ordinary English meanings. This being subject to any specific evidence of trade usage giving particular terminology a specialised definition.

This finding may affect all importers' whose product potentially has characteristics of both GST-free and GST-liable goods.

# Pearce v Coynes Freight Management Group Pty Ltd [2010] FCA 320

## Facts

Coynes Freight Management Group Pty Ltd ("**Coynes**") operated and managed two warehousing businesses which were licensed under section 79 of the *Customs Act 1901* ("**the Customs Act**"). In May 2008 Armik Group Pty Ltd imported a quantity of vodka from the Ukraine into Australia ("**the goods**") and entered it for warehousing at Coynes' premises. In June 2008, 849 cartons of the goods were stolen from Coynes' warehouse by persons unknown.

The Australian Customs Service (now the Australian Customs and Border Security Service) ("**Customs**") demanded Coynes pay an amount equal to the duty payable on the stolen goods. Coynes refused to comply with the demand, and instead made an application for remission of duty as an 'owner' of the goods pursuant to section 163 of the Customs Act. Customs rejected Coynes application for remission. These proceedings were brought by Pearce, a collector under the Customs Act, seeking payment of the monies demanded by Customs.

The principal question was whether a warehouse licensee, from whom dutiable goods were stolen whilst under the control of Customs, may defend a demand made under section 35A of the Customs Act on the grounds that the licensee was entitled to a remission of duty under section 163 of the Customs Act.

## Finding on the facts

Justice Dodds-Streeton found that Coynes was liable under section 35A of the Customs Act, but was unable to claim a remission of that liability under section 163 of the Customs Act.

Other comments in the judgement which warrant consideration are as follows

- section 35A of the Customs Act does not impose a liability to pay duty; instead it is a liability to pay an amount equivalent to the duty which would have been payable on the goods;
- the conditions for liability under section 35A of the Customs Act were satisfied insofar as Coynes had been entrusted with possession, custody or control of the goods subject to the control of Customs;
- the liability under section 35A of the Customs Act for a warehouse licensee is a '*practically absolute obligation*' and '*independent of fault*';
- the use of the terminology '*possession, custody or control*' as specified in section 35A of the Customs Act is narrower than the definition of 'owner' under section 4(1) of the Customs Act;
- section 163 of the Customs Act is limited to refunds, rebates and remissions of **duty**, it does not refer to the remission of an amount due under section 35A of the Customs Act; and
- there was no defence to liability under section 35A of the Customs Act based on an entitlement to a remission of duty as Coynes was not the 'owner' within the terms of section 4(1) of the Customs Act and therefore not liable to pay duty under section 153 of the Customs Act.

## How is this decision relevant to warehouse licensees?

- This Federal Court decision affirms the almost absolute liability of warehouse licensees under section 35A of the Customs Act when dutiable goods are stolen.
- The liability is for an amount equal to the duty payable on the goods, not the duty itself.
- The consequence of this is that those liable under section 35A of the Customs Act are therefore not entitled to the defence of remission of duty under section 163 of the Customs Act as they are not 'owners' liable to pay duty under section 153 of the Customs Act.

This decision may affect not only all warehouse licensees but also others potentially caught by the liabilities imposed by section 35A of the Customs Act. Section 35A of the Customs Act catches those holding goods subject to Customs control. This includes, but is not limited to, those holding depot licences under section 77G of the Customs Act, container terminal operators and wharf operators.

## New liabilities under sections 36 and 37 of the Customs Act

In addition to the liabilities discussed in this case under section 35A of the Customs Act, warehouse licensees and others holding goods under Customs control will also soon be subject to new penalties under the revised sections 36 and 37 of the Customs Act for failure to keep safe or account for goods under Customs control.

These penalties have already been introduced, with the administrative moratorium ceasing on the 22 May 2010. They are strict liability, fault based and allow for the issue of infringement notices to offending licensees.

## For further information please contact

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