August 1994

Use of Administrative Decisions (Judicial Review) Against Customs Seizures

Robert Livingstone-Ward
King & Company Solicitors

Follow this and additional works at: <http://epublications.bond.edu.au/rlj>

Recommended Citation

Livingstone-Ward, Robert (1994) "Use of Administrative Decisions (Judicial Review) Against Customs Seizures," *Revenue Law Journal*: Vol. 4 : Iss. 2 , Article 6.
Available at: <http://epublications.bond.edu.au/rlj/vol4/iss2/6>

This Journal Article is brought to you by the Faculty of Law at [ePublications@bond](mailto:EPublications@bond). It has been accepted for inclusion in Revenue Law Journal by an authorized administrator of [ePublications@bond](mailto:EPublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

Use of Administrative Decisions (Judicial Review) Against Customs Seizures

Abstract

This article examines whether the Administrative Decisions (Judicial Review) Act is an effective remedy in the battle for seized goods. The alternative options are reviewed in the light of past decisions and the extent of the Federal Court's jurisdiction.

Keywords

Customs Act, law, Administrative decisions

USE OF ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) AGAINST CUSTOMS SEIZURES

Robert Livingstone-Ward
Solicitor
King & Company*
Solicitors, Brisbane

This article examines whether the Administrative Decisions (Judicial Review) Act is an effective remedy in the battle for seized goods. The alternative options are reviewed in the light of past decisions and the extent of the Federal Court's jurisdiction.

One area in the field of Customs in which the Administrative Decisions (Judicial Review) Act ("AD(JR)") is often considered as a remedy is the seizure of goods. Previous Federal Court decisions indicate that it has not been a particularly successful remedy and, indeed, a number of decisions suggest that it is either inappropriate or unavailable. This article considers whether AD(JR) is an effective weapon in the battle for seized goods.

Customs Act - seizure, forfeiture and condemnation

Pursuant to s 203 of the Customs Act, a Customs Officer (or any other "authorised person", as defined) has the discretion to seize:

- goods which are forfeited;
- goods which he or she believes are forfeited, provided there are in existence reasonable grounds for that belief.

Division 1 of Part XIII of the Customs Act enumerates those seized goods which are forfeited to the Crown, including ships, aircraft, goods and packages. On the authority of the High Court decision in *Burton v Honan*,¹ goods are forfeited on the performance of the act which leads to their forfeiture. For example, smuggled goods are forfeited pursuant to para 229(1)(a) of the Act, and they become forfeited as

* The opinions expressed herein are those of the author and do not necessarily reflect the views of King & Company.

¹ (1952) 86 CLR 169 at 176 (and a number of subsequent cases).

(1994) 4 Revenue L J

soon as they are smuggled. Forfeiture occurs automatically, and is not dependent on a subsequent act or decision, such as seizure. Once the act has occurred, the goods are forfeited and the Customs Officer can, if he or she wishes, seize them.

Although the goods are already forfeited to the Crown, the Australian Customs Service (ACS) cannot dispose of goods which have been seized until they are condemned.² Condemnation can occur in a variety of ways:

- the effluxion of time:
 - . failure to claim the goods within 30 days of the issue of a notice of seizure,³
 - . inability to serve a notice of seizure within 30 days of seizure, due to insufficient information,⁴
 - . failure to bring an action for the recovery of the goods within 4 months of the issue of a s 208A notice,⁵
- conviction of an offence which has caused a forfeiture (eg a conviction for smuggling under s 233 of the Customs Act),⁶
- any other order from a Court of competent jurisdiction effecting condemnation.

The Customs Act sets out a scheme relating to the seizure of goods; a scheme which has been outlined in a number of cases in the past.⁷ The process which would normally flow is:

- (a) The goods are forfeited (or believed, on reasonable grounds, to be forfeited).⁸

² See s 208D.

³ Subsection 205(6).

⁴ Subsection 205(7).

⁵ Subsection 208A(2) and (4).

⁶ Section 262.

⁷ See, *Pearce v Button* (1986) 8 FCR 408 at 418 ff, per Lockhart J.

⁸ Sections 228 to 230.

R Livingstone-Ward Customs Seizures

- (b) The goods are seized.⁹
- (c) A notice of seizure is issued.¹⁰
- (d) If a claim is not made for the goods within 30 days of the notice of seizure, the goods are condemned, and that is the end of the matter.¹¹
- (e) If a seizure notice cannot be issued within 30 days of the seizure, the goods are deemed to be condemned, and that is the end of the matter.¹²
- (f) If a seizure notice is served and a claim is made within time, the ACS then has to achieve condemnation otherwise than by effluxion of time under s 205. This can take the form of :
 - a customs prosecution (defined to include condemnation proceedings in s 244), whereby, if successful, condemnation is effected under s 262; or
 - the issue of a s 208A notice, which requires the person to bring an action against the Collector for recovery of the goods. Special provisions are made for the situation where the goods themselves have been returned on security. If the recovery action is not brought within 4 months, condemnation is again achieved by effluxion of time. If a recovery action is brought, then the Court will decide the issue.

However, since 1980, AD(JR) has been injected into this process, effectively interrupting the statutory flow anticipated by the scheme set up under the Customs Act. Can AD(JR) action effectively achieve anything?

Reviewable decisions under AD(JR)

The AD(JR) Act provides for the judicial review by the Federal Court of Australia of "decisions of an administrative character made under an enactment" (ie, a Commonwealth Act), subject to certain exclusions. In

⁹ Section 203.

¹⁰ Section 205.

¹¹ Ibid.

¹² Ibid.

(1994) 4 Revenue L J

a seizure context, there are a number of potential "decisions" made under the Customs Act which can be considered. These are outlined below.

The decision to seize the goods is a decision which has been reviewed on numerous occasions by the Federal Court under the AD(JR) Act, from *Vickers v Young*¹³ to *Whim Creek Consolidated NL v Colgan*.¹⁴

It is interesting to note that Pincus J in *Pearce v Button*¹⁵ found that "the seizure was not a 'decision', in my view, but simply an action". However, His Honour was there considering s 25D of the Acts Interpretation Act, and was nevertheless content to review the seizures under the AD(JR) Act.

The applicant in *Whim Creek Consolidated NL v Colgan* attempted to categorise all of the activities of Customs Officers leading up to the seizure (eg investigations, reports to supervisors, etc) as reviewable "decisions" under the AD(JR) Act. Both the Judge at first instance¹⁶ and the Full Federal Court¹⁷ found that these decisions were not reviewable decisions (although they may have been reviewable as "conduct" under s 6 of the AD(JR) Act).

The "decision" to issue a notice of seizure under s 205 was held not to be a reviewable decision under the AD(JR) Act in *Sandery v Commissioner of Police*.¹⁸ Jackson J considered that the responsible person was "simply performing the functions which subs 205(2) requires him to perform".

Jackson J also found that there is no "decision" to forfeit goods under the Customs Act.¹⁹ This is in line with a variety of other decisions to the effect that forfeiture is not a decision, but merely occurs by operation of the Customs Act.²⁰

¹³ (1982) 43 ALR 389.

¹⁴ (1991) 103 ALR 204.

¹⁵ (1985) 8 FCR 388 at 399.

¹⁶ Lee J, (1990) 22 ALD 215 at 217.

¹⁷ Above n 14 at 214 and following O'Loughlin J, with whom Spender and French JJ agreed.

¹⁸ (1985) 65 ALR 181 at 184.

¹⁹ Ibid.

²⁰ *Burton v Honan*, above n 1 at 176 per Dixon CJ; *Pearce v Button*, above n 15 at 410 per Fox J, and at 430 per Spender J; *Tetron International Pty Ltd v Luckman* (1985) 8 ALD 243 at 246 per Northrop J; *Frost v Collector of Customs* (1985) 9 FCR 174 at 189 per Wilcox J; *Whim Creek Consolidated NL v Colgan* above n 14 at 210 - 211 per O'Loughlin J.

It is submitted that condemnation must operate in a similar way, in that there is no "decision" to condemn, and it thus is not reviewable.

The decision to issue a s 208A notice has been held to be reviewable under the AD(JR) Act in *Williams v Collector of Customs (Queensland)*²¹ and *Sandery v Commissioner of Police*.²² However, one must have severe doubts as to what use the end result of such a review would be, even if the matter was decided in favour of the applicant.

The possibility that the continued detention of goods may constitute a reviewable decision(s) under the AD(JR) Act was considered by the Full Federal Court in *Pearce v Button*,²³ but each of the three Judges in that case concluded that it was not a viable argument.²⁴

Consequently, it would appear that there are only two reviewable decisions made during the seizure process under the Customs Act pursuant to the AD(JR) legislation: the seizure itself and the issue of a s 208A notice.

Federal Court jurisdiction

One of the perceived drawbacks of instituting an AD(JR) action in a seizure matter has been the apparent restriction placed on the Federal Court as to the remedies it can grant in relation to the ultimate status of the goods - ie, ordering a return of the goods, having determined who has title to them (the Crown or the importer).

It is open to the Federal Court, on reviewing seizure, to find that one of the AD(JR) s 5 grounds has been met, and therefore overturn the decision to seize. In law, with the seizure decision thus voided through a technical fault in the seizure process, the goods would have to be returned. In practice, however, rarely would the goods have been returned by the ACS, or if they were, it would be only temporarily, for the goods could be resealed once the technical flaw highlighted by the AD(JR) action was corrected.²⁵ The Federal Court decision on the seizure would not determine if the goods were forfeited, and a new seizure could thus take place. Therefore, at best, an AD(JR) action

²¹ Noted at (1987) 12 ALD 216 at 217.

²² Above n 18 at 186.

²³ Above n 7.

²⁴ Fox J at 411, Lockhart J at 420 and Spender J at 429.

²⁵ See *Frost v Collector of Customs*, above n 20 at 187; *Whim Creek Consolidated NL v Colgan*, above n 14.

(1994) 4 Revenue L J

would only delay determining whether title was vested in the Crown through forfeiture or not.

The same could be said for a review of the issue of a s 208A notice. Even if the Federal Court found that, for example, there had been a breach of the rules of natural justice or a failure to observe legal procedures, these could be overcome and a new notice issued. The result is therefore only a deferment, not a determination, of the substantive issue of forfeiture.

This difficulty was crystallised by the Full Federal Court in *Pearce v Button*,²⁶ which concluded that the Court did not have the jurisdiction to decide the ultimate question of forfeiture: it could only review the administrative decision to seize.

The effect of this can be illustrated by reference to a fact situation such as that exposed in *Defiance Enterprises Pty Ltd v Collector of Customs (Queensland)*²⁷ where the Supreme Court of Queensland, on hearing a detinue action for the return of the goods, found that the machines in question were not forfeited but that the seizure was valid. The finding of no forfeiture resulted, of course, in judgment for Defiance and a return of the goods, but the Customs Officer was vindicated in his decision to seize on the basis that, on the material before him at the time of his decision, there existed reasonable grounds for believing that the goods were forfeited. Had Defiance commenced an AD(JR) action to challenge the seizure in the Federal Court instead of following the alternative path of a detinue action, it would most probably have lost the case. The Federal Court would have found that the decision to seize was valid, and would not have ordered a return of the goods. This is because, on the authority of *Pearce v Button*,²⁸ it could not consider the forfeiture issue. Defiance would then have had to commence further proceedings elsewhere to challenge the forfeiture issue.

Consequently, if the Full Federal Court decision in *Pearce v Button*²⁹ was the only authority on this topic, challenging the seizure under AD(JR) would, in reality, be quite ineffective.

²⁶ Above n 7.

²⁷ (1990) 96 ALR 697 (and on appeal: Unreported: 28 June 1991, Demack, McKenzie and Thomas JJ).

²⁸ Above n 7.

²⁹ Ibid.

Turner v Owen³⁰

The jurisdiction of the Federal Court to hear forfeiture as well as seizure has been considered by a number of single judges of the Federal Court, both before and after the Full Court decision in *Pearce v Button*.³¹

The question of the Federal Court's jurisdiction was revisited in 1990 by the Full Federal Court in *Turner v Owen*.³² This time, the Court was constituted by different judges to the Full Court in *Pearce v Button*³³ and included Pincus J who had previously found that he did in fact have jurisdiction to determine forfeiture, as the judge at first instance in *Pearce v Button*.³⁴

A variety of grounds were considered by their Honours, including concepts such as accrued jurisdiction, cross-vesting legislation and s 32 of the Federal Court of Australia Act. In short, each concluded that, at least on the facts of *Turner v Owen*, the Court did have jurisdiction to determine forfeiture.

AD(JR) - is it worthwhile?

The importance, then, of *Turner v Owen*, is that it is now possible for the Federal Court to determine the ultimate fate of the goods, rather than merely considering the interim decisions of seizure or a s 208A notice. Were it only possible to decide seizure or a s 208A notice, then it is submitted that an AD(JR) action is, for the most part, a waste of time and resources. It would be far more effective to pour one's efforts into a legal action which would determine who has title to the goods - the Crown or the importer. This could take the form of a detainee action in a State Supreme Court (as in *Defiance Enterprises Pty Ltd v Collector of Customs (Queensland)*),³⁵ whether or not in response to a s

³⁰ (1990) 21 ALD 115.

³¹ These include: *Brunetto v Collector of Customs* (1984) 4 FCR 92 (Toohey J); *French v O'Connor* (Unreported: 23 May 1985, Northrop J); *Convery v Ziino* (1985) 7 ALN 402 (Neaves J); *Tetron International Pty Ltd v Luckman*, above n 20 (Northrop J); *Frost v Collector of Customs*, above n 20 (Wilcox J); *Bangkok (Wholesale) Australia Pty Limited v Wheat* (Unreported: 6 December 1985, Wilcox J); *Sandery v Commissioner of Police*, above n 18 (Jackson J); and *O'Neil v Wratten* (1985) 65 ALR 45 (Jackson J).

³² Above n 30.

³³ Above n 7.

³⁴ Above n 15.

³⁵ Above n 27.

(1994) 4 Revenue L J

208A notice, or even merely defending any prosecution proceedings which might eventuate.

Indeed, this is still an alternative, making the range of options available as follows:

- commence an AD(JR) action on the seizure, and then seek to have forfeiture determined by the Court under *Turner v Owen*;
- commence a detinue action to recover the goods; or
- await a decision by the ACS as to whether it will prosecute or issue a s 208A notice, and respond accordingly by either:
 - . defending the prosecution; or
 - . commencing a detinue action in response to the s 208A notice.

In addition, O'Loughlin J in *Whim Creek Consolidated NL v Colgan*³⁶ pointed out that there is no obligation on the ACS under the Customs Act to do anything at all. It is possible for the ACS merely to rely on the alleged forfeiture and seizure as vesting title in the Crown, and wait for the importer to enforce its common law rights (eg by a detinue action). Whilst this is, no doubt, true, it is submitted that, in practice, the ACS will still seek to obtain condemnation of the goods to entitle it to dispose of them under s 208D. Consequently, it is submitted, the ACS will eventually make an election to prosecute or to issue a s 208A notice.

With the ability of the Federal Court to determine forfeiture, AD(JR) is now a viable solution to seizure, and, by and large, Federal Court proceedings are faster than those in the State Supreme Courts. There are, however, several other factors to be borne in mind when considering the institution of an AD(JR) action.

Normally, the action must be commenced within 28 days of the decision in question (ie the decision to seize). This issue was addressed in *Williams v Collector of Customs (Queensland)*,³⁷ where it was held that the 4 month period under s 208A does not override the 28 day period

³⁶ Above n 14 at 211.

³⁷ Above n 21.

under the AD(JR) Act.

This time period can be extended on application to the Federal Court pursuant to para 11(1)(c) of the AD(JR) Act. There is a significant body of law on the question of extensions of time, but extensions have only occasionally been given in seizure matters, and never without good reasons for the delay.

The period can be extended in practice by requesting a statement of reasons for the decision to seize under s 13 of the AD(JR) Act.³⁸ The request must be made, again within 28 days of the decision, and the ACS has 28 days to respond. On receipt of the statement, the applicant has a further 28 days within which to launch an AD(JR) action. Thus, by requesting a s 13 statement, a decision by the importer to bring an AD(JR) action can be deferred by a maximum of 84 days, if required.

A second point to bear in mind in launching an AD(JR) action is that, although pursuant to *Turner v Owen* the Federal Court has jurisdiction to determine forfeiture, it may choose not to. In *Turner v Owen* itself, French J stated,³⁹

Whether the Court will embark upon such an inquiry (ie forfeiture) will depend upon its width and the convenience of determining it.

He further stated⁴⁰ that he could not determine whether the weapons in question in that case were not forfeited: he could only conclude whether they were or were not forfeited under the specific provisions raised by the Respondent (ACS) at the hearing (eg Items 18 and 30 of the Second Schedule to the Customs (Prohibited Imports) Regulations). To make a blanket finding on forfeiture would involve consideration as to whether all possible bases for forfeiture under the Customs Act (and perhaps other pieces of legislation) had been exhausted. In this respect, His Honour stated:⁴¹

To go further as was suggested and make a declaration in that event that they were not forfeited would require a wider inquiry than the scope of the case and the evidence allows.

Consequently, it could be argued that the best that the Federal Court may be able to do is to declare that the goods are not forfeit pursuant to the particular provisions relied upon by the ACS. This may not be

³⁸ See *Murphy v KRM Holdings Pty Ltd* (1985) 8 FCR 349.

³⁹ Above n 30 at 136.

⁴⁰ Ibid.

⁴¹ Ibid.

(1994) 4 Revenue L J

sufficient to secure a return of the goods. However, this argument may not necessarily carry much weight, for State Supreme Courts apparently have little difficulty in determining the rights to goods in a detinue action without considering all remotely possible grounds for forfeiture.

Considering the high cost of litigation, it is essential that one must be certain that the action contemplated can result in a return of the goods.

Another factor which is worthy of consideration is the fact that an AD(JR) action may divert ACS resources from the investigation and thus slow things down. Whether this is advantageous or not will depend upon the individual circumstances of the case. It may be preferable to allow the ACS to complete its investigations quickly in order to satisfy the officers involved that there is nothing untoward in the transaction. Alternatively, an interruption of the investigation may be desirable to allow time for the preparation of a suitable defence to a potential prosecution.

Alternatives

What type of action is the most efficient method of challenging a seizure ultimately depends upon the facts of each case. It is important to realise that court action is probably inevitable. As previously mentioned, the ACS needs to effect condemnation. Assuming that the goods have been claimed under s 205, the ACS will either prosecute or issue a s 208A notice requiring the importer to sue the collector. Consequently, it may be advisable to wait until the ACS decides what action it will take rather than pre-empt the matter with a legal action of one's own, such as AD(JR) proceedings. Otherwise, the result may be several different court cases concerning the same subject matter, ie an AD(JR) action commenced by the importer plus either a detinue action (seeking return or declaration) in response to a s 208A notice,⁴² or a prosecution.⁴³ It is entirely conceivable that all three types of actions will be commenced: an AD(JR) action, a detinue action and a prosecution. Any such situation would be an expensive exercise and the importer would undoubtedly never recoup all costs involved, even if awards of costs were made in his or her favour.

The down side of waiting until the ACS decides is that the importer will be denied the goods for this period of time. There is no time limit

⁴² As in *Whim Creek Consolidated NL v Colgan*, above n 14.

⁴³ As in *Williams v Collector of Customs (Queensland)*, above n 21.

under s 208A as to when the ACS must issue a notice, and the ACS has five years within which to commence a prosecution.⁴⁴ It is no secret that Customs investigations can take years, and may not reach court for an inordinate period of time.⁴⁵ Consequently, an AD(JR) action commenced straight after the seizure may be desirable in order to have the matter resolved quickly.

It is also important to again be cognisant of the 28 day time limit under AD(JR). Once a decision has been made to await the outcome of deliberations by the ACS, AD(JR) effectively ceases to be an alternative.

For those importers who require the goods quickly, one should always remember that the market value of the goods can be lodged with the ACS as security (often in the form of documentary security) in return for the goods themselves, pursuant to s 208 of the Customs Act.

Obviously, an AD(JR) action is appropriate where the seizure is so outrageous that it cannot stand. However, this would, it is submitted, be extremely rare, as customs officers are aware of how litigious the area is. It is to be remembered that the goods can be seized on the basis of reasonable grounds to believe that the goods are forfeited, and the courts are usually prepared to find that such grounds do exist, even if the goods themselves are not forfeited.⁴⁶

Section 208A

As noted earlier, it has been established by some of the cases that the decision to issue a s 208A notice is reviewable under AD(JR). However, it is submitted that this is a superfluous action. Even if the decision to issue such a notice was overturned (and it is difficult to envisage any ground under s 5 of the AD(JR) Act for doing so), what is the end result? One is no closer to securing a return of the goods; in fact, the ACS would probably merely issue a fresh s 208A notice, from which time the four month period would start again.

It may be acceptable to include a review of this decision in the same application seeking a review of the seizure decision, but the result could not be enhanced in any way.

⁴⁴ Section 249 of the Customs Act.

⁴⁵ See, eg, *Jack Brabham Holdings Pty Ltd v Minister for Industry, Technology and Commerce* (1988) 85 ALR 640, which relates to events occurring in 1976.

⁴⁶ As in *Defiance Industries Pty Ltd v Collector of Customs (Queensland)*, above n 27.

(1994) 4 Revenue L J

What is in question is whether, on receipt of a s 208A notice, it is possible to respond with an AD(JR) action. Section 208A requires that an action be for the recovery of the goods⁴⁷ or for a declaration that the goods are not forfeited (when the goods have been returned on security under s 208).⁴⁸ An AD(JR) action is first and foremost a review of an administrative decision (ie, the seizure or the issue of the s 208A notice). As indicated in the decision of French J in *Turner v Owen*,⁴⁹ the Federal Court may not always consider the forfeiture of the goods in an AD(JR) hearing.⁵⁰

Consequently, it is quite possible that one may not obtain an order for recovery of the goods or a declaration that the goods are not forfeit from an AD(JR) action launched in response to a s 208A notice. In a worst case scenario, if an AD(JR) action is not considered to be an action for recovery/declaration as to forfeiture, as required under s 208A, the goods may thus be condemned with the effluxion of the four month period, regardless of forfeiture and even if an AD(JR) action is commenced. It may therefore be wiser to respond to a s 208A notice with a State Supreme Court detinue action seeking orders appropriate to s 208A rather than an AD(JR) action.

Conclusion

The costs involved in litigation are such that one should always carefully consider alternative actions to determine which will provide the most effective remedy.

AD(JR) actions were quite common in the mid-1980's as a remedy for seizures, but they were rarely successful due to perceived limitations on the Federal Court's jurisdiction to determine forfeiture. This has been crystallised by the Full Federal Court's decision in *Turner v Owen*, but the Court still has a certain amount of discretion as to whether it will consider forfeiture.

The important thing to remember is that, whatever action is chosen, it should be designed not merely to review some interim action by the ACS, such as seizure or the issue of a s 208A notice. To be truly effective, the action must be able to result in an order by the court as to who has clear title to the goods and for a return of those goods.

⁴⁷ Paragraph 208A(1)(b).

⁴⁸ Subsection 208A(3).

⁴⁹ Above n 30.

⁵⁰ See also Neaves J in *Convery v Ziino* (Unreported: 27 May 1985 at page 10).

R Livingstone-Ward Customs Seizures

This can be achieved by a *detinue* action, or even successfully defending a prosecution (thus denying a s 263 condemnation). However, even with the decision in *Turner v Owen* (and in fact, because of some of the statements in that case, notably by French J), there can never be a complete guarantee that an AD(JR) action will achieve the desired result.