GSTD 2005/D2 - Goods and services tax: is a payment from a non-resident car manufacturer to an Australian distributor under an offshore warranty chargeback arrangement subject to GST?

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This document has been finalised.

Draft Goods and Services Tax Determination

Goods and services tax: is a payment from a non-resident car manufacturer to an Australian distributor under an offshore warranty chargeback arrangement subject to GST?

Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling or advice for the purposes of section 37 of the ***Taxation Administration Act 1953****. The final Determination will be a public ruling for the purposes of section 37 and may be relied upon by any entity to which it applies.*

1. No. There is no supply for which such a payment is consideration.

Background

2. Non-resident manufacturers commonly supply cars to a distributor for subsequent supply to the customer directly, or through a dealer network. Alternatively, a manufacturer may supply the cars directly to customers in Australia. Cars supplied through a distributor to customers in Australia may come with a warranty from the distributor or with a warranty from the manufacturer.[1] Cars supplied by a manufacturer directly to customers in Australia may be supplied with a warranty from the manufacturer.

3. This Determination considers the treatment of a payment from a non-resident manufacturer to an Australian distributor in circumstances where the distributor, under its own warranty with a customer, repairs a customer's car or engages a third party to make the repairs. The treatment of a payment from a non-resident manufacturer to an Australian repairer in circumstances where a non-resident manufacturer, under a warranty with a customer, engages a third party repairer to make repairs to the customer's goods is considered in GSTD 2005/D3.

[1] Where, in this Determination, we use the term 'manufacturer', we are referring to a manufacturer that is not a resident of Australia, unless otherwise specified. Also, where we use the term 'distributor', we are referring to a distributor that is a resident of Australia, unless it is specified otherwise.

4. The warranty from the manufacturer:[2]

- covers some or all of the cars supplied by the manufacturer to the distributor;
- requires the Australian distributor to supply a warranty with the car;
- requires the Australian distributor to undertake repairs; and
- requires the non-resident manufacturer to pay the Australian distributor an amount in respect of the repairs.

5. Called variously, an 'offshore warranty chargeback arrangement', a 'cross border warranty arrangement', an 'overseas warranty charge', 'recharge', 'compensation', or 'reimbursement', the name given to such an arrangement between a non-resident manufacturer and an Australian distributor does not necessarily affect its characterisation. In this Determination we refer to such a warranty as an offshore warranty.

6. Any warranty the Australian distributor may provide to a customer who ultimately purchases a car is a separate warranty (the domestic warranty). Its terms may be similar to (and are commonly broader than) the terms of the offshore warranty from the manufacturer. For example, the distributor may offer a warranty with a longer period of cover.

7. When the need for a repair to a car becomes evident, it could be owned by one of various entities, such as the distributor, a dealer, another intermediary or the final customer. The repairs may be made by the Australian distributor itself, or by a dealer or a third party repairer for the distributor. In each case, once the repairs are carried out the Australian distributor makes a claim from the non-resident manufacturer under the offshore warranty. The amount claimed may be less than the cost that the distributor incurred for the repair. The distributor might not make a claim for all repairs because the domestic warranty it supplied, as noted above, may be broader than that from the manufacturer. The attached diagram illustrates supplies and payments between parties where repairs are undertaken, and where there is both a domestic and an offshore warranty.

8. If there is a supply of repair services from an Australian distributor to a non-resident manufacturer who is not in Australia when the repair services are done, and if the manufacturer acquires the services in carrying on its enterprise, but is not registered or required to be registered, the supply of the repair services meets the requirements of item 2 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act).[3] However, if the services are provided to an Australian resident customer of the distributor, subsection 38-190(3) of the GST Act would apply and the supply may be a taxable supply. In the present context, subsection 38-190(3) can only apply if there is a supply from the distributor to the non-resident manufacturer in the first place. A scenario illustrating these principles is considered in GSTD 2005/D3.

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[2] The contractual rights and obligations of the parties under the warranty are set out in a series of written and oral agreements between the parties, which can include any or all of the following documents: a warranty agreement, a warranty policy and procedures manual, a sales and service agreement, a distributor agreement, and/or an importer agreement. These agreements also cover other matters, such as the sale of vehicles from the manufacturer to the distributor, the import of the vehicles and quality checks of the vehicles on arrival into Australia.

[3] In the New Zealand case of *Suzuki New Zealand Limited v. Commissioner of Inland Revenue* (2001) 20 NZTC 17096 (*Suzuki*) which considered an offshore warranty chargeback arrangement, the New Zealand Court of Appeal found that there was a supply of repair services from the distributor to the manufacturer as well as a supply of services to the distributor's customer. This case is discussed at paragraphs 17 to 21 and 24 to 29.

Previous Rulings

9. The subject of this draft Determination was considered in Example 21 of Draft Goods and Services Tax Ruling GSTR 2003/D7 Goods and services tax: the scope of subsection 38-190(3) and its application to supplies of things (other than goods or real property) made to non-residents that are GST-free under item 2 of the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*. This draft Determination replaces Example 21.

Explanation

10. When repairs are made by the Australian distributor, or by its authorised repairer, there are obligations under two warranty arrangements that are relevant – the domestic warranty given by the distributor, and the offshore warranty given by the non-resident manufacturer.

11. Under the offshore warranty, the non-resident manufacturer cannot make the repairs itself as it has no presence in Australia. In practice, neither the non-resident manufacturer nor the distributor expects or intends the non-resident manufacturer to undertake the repairs. The fact that the non-resident manufacturer requires the distributor to have in place a warranty under which the distributor is required to make repairs demonstrates this. Additionally, circumstances other than the contractual relationships between parties may be relevant to correctly characterising attributes of the transaction between them.[4] Such circumstances include the behaviour of the parties.

12. If the non-resident manufacturer, itself, engaged a repairer to make the repairs, the repairer would be making a supply of repair services to the manufacturer.[5] However, the distributor repaired the car or has had the car repaired because it is required to do so on its own account under the domestic warranty.[6] While the wording of the warranty agreement between the manufacturer and the distributor may suggest that the manufacturer is required to repair the car, the surrounding circumstances show that the manufacturer is not so required, and in any case cannot do so once it is carried out by the distributor. The manufacturer is required to pay to the distributor its costs (or some of its costs) for having the car repaired. By paying the distributor at a rate agreed in the warranty, the non-resident manufacturer meets its obligation to the distributor.

13. Circumstances surrounding a warranty's contractual arrangements, and the way these arrangements are carried out, indicate that the repairs are something the distributor does on its own account. These circumstances include:

- the non-resident manufacturer's inability to make the repairs itself;
- the distributor's obligation to make repairs under a separate warranty owed to the customer; and

[4] See for instance, *LNC (Wholesale) Pty Ltd v. Collector of Customs* (1988) 17 FCR 154 at 160 and 166, *Chief Executive Officer of Customs v. AMI Toyota Ltd.* [2000] FCA 1343 (unreported) at paragraph 38, and the United Kingdom case *WHA Ltd & ors v. Customs and Excise Commissioners* [2004] BVC 485 at paragraph 35.

[5] Refer to Draft GSTD 2005/D3 which is about payments from a non-resident manufacturer to an Australian repairer under an offshore warranty.

[6] See *Chief Executive Officer of Customs v. AMI Toyota Ltd.* [2000] FCA 1343 (unreported) at paragraphs 40 and 41.

- the intent of the parties to apply the warranty undertakings given by the non-resident manufacturer on the basis of the non-resident manufacturer having a payment obligation rather than a repair obligation, and the parties acting on this basis.

14. We consider that the arrangement is one where the non-resident manufacturer has undertaken an obligation to make a payment to the distributor at agreed rates if a certain event, being the need to repair the vehicle, occurs. This indicates that the payment is not consideration for a supply.

15. The amount, or a way of working out the amount, to which the Australian distributor is entitled for meeting the manufacturer's obligations, may be set out in the agreement between the Australian distributor and the non-resident manufacturer. For example, in relation to cars, this amount can be calculated by reference to specified costs for parts and/or labour for particular repairs. The non-resident manufacturer's payment to the Australian distributor is not necessarily for the total cost the distributor incurred in having the repairs made. The distributor can agree to a lesser amount, in effect agreeing to take on itself some of the risk associated with possible defects in the goods. While the payment is calculated on the basis of the repairs carried out, and in that way is related to the repairs, the payment is not, in our view, a payment made for the repairs. Indeed, the arrangements between a distributor and a non-resident manufacturer are such that the distributor gives and honours its warranty obligations solely on its own account although the non-resident manufacturer's obligation to make a payment may arise by reason of this giving and honouring of the warranties.[7]

16. In these circumstances we do not consider there to be a supply from the distributor to the non-resident manufacturer for which this payment is consideration. As the non-resident manufacturer has a payment obligation rather than a repair obligation there is no need for it to engage a repairer in Australia to carry out the repairs. This means that while the written agreements might indicate that the distributor has agreed to supply repair services to the non-resident manufacturer this is not the case: there is no intention for there to be a supply of repair services from the distributor to the manufacturer. The payment is made to satisfy the non-resident manufacturer's obligation under the offshore warranty to make the payment if repairs that fall within the terms of the warranty are necessary. While the amount of the payment is calculated with reference to the repairs carried out, this does not mean that there is a supply from the distributor to the non-resident manufacturer. It is just that the manufacturer's obligation is determined in advance under the offshore warranty arrangement. Accordingly, we consider that there is no taxable supply and, hence, no GST payable in relation to the payment from the manufacturer to the distributor. We note, however, that the New Zealand Court of Appeal in the case of *Suzuki New Zealand Limited v. Commissioner of Inland Revenue* (2001) 20 NZTC 17096 (*Suzuki*) found that there was a supply of repair services from the distributor to the manufacturer as well as a supply of those services to the distributor's customer.

[7] See *Chief Executive Officer of Customs v. AMI Toyota Ltd.* [2000] FCA 1343 (unreported) at paragraphs 40 and 41.

The *Suzuki* case

17. In *Suzuki* a non-resident manufacturer, Suzuki Motor Corporation (SMC), supplied motor vehicles, with a warranty, to its New Zealand distributor, Suzuki New Zealand (SNZ) which, in turn, supplied the motor vehicles to customers either directly or through a dealer, but in either case with a warranty.[8] The issue was whether GST was payable in relation to payments by SMC to SNZ in accordance with SMC's warranty to SNZ. The Court concluded that there was GST payable in relation to those payments because those payments were consideration for a supply of repair services from SNZ to SMC. Blanchard J based this conclusion on the warranty agreement and other documents before the Court and on the evidence of the surrounding circumstances. In this regard, he stated:

> Although the documents do not in a straightforward way place on SNZ the obligation, on SMC's behalf, to carry out repairs through dealers acting as SNZ's agents, it is quite clear when the documentation as a whole is examined, that this was the contractual intention.[9]

18. Blanchard J noted that:

> SNZ was to undertake repair services which would otherwise fall upon SMC and would be paid, by an offsetting mechanism, for the repairs.[10]

19. Blanchard J also found the contractual intention and effect of the documents was to '…place on SNZ the obligation, on SMC's behalf, to carry out repairs …'.[11]

20. Further, it was found on the evidence that '…SMC's payments were in respect of taxable supplies of repair services by SNZ to SMC'.[12] It was found that:

> This is simply an instance … in which performance obligations under two separate contracts with different counter-parties overlap, so that performance of an obligation under one contract also happens to perform an obligation under another.[13]

21. The New Zealand Court of Appeal found that, based on its conclusion about the documents and other facts before it, the New Zealand distributor, SNZ, performed the repairs on two accounts; on its own account to fulfil the obligations it owed the customer under its warranty, and on behalf of the manufacturer, SMC, to fulfil the obligations SMC owed SNZ under its warranty. From this follows the Court's conclusion that there is a supply of repair services from the distributor to the manufacturer.[14] However, this factual conclusion does not establish a general principle that there is a supply of repair services from distributors to manufacturers under offshore warranty chargebacks. A different conclusion about the facts is possible, as shown in the *Toyota* case.

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[8] In the circumstances the subject of this Determination the warranty from the manufacturer is not just to the distributor as appears to be the case in *Suzuki*. Note also the implications of the *Trade Practices Act 1974* for the manufacturer.

[9] *Suzuki New Zealand Limited v. Commissioner of Inland Revenue* (2001) 20 NZTC 17096 at 17,102.

[10] *Suzuki New Zealand Limited v. Commissioner of Inland Revenue* (2001) 20 NZTC 17096 at 17,102.

[11] *Suzuki New Zealand Limited v. Commissioner of Inland Revenue* (2001) 20 NZTC 17096 at 17,102.

[12] *Suzuki New Zealand Limited v. Commissioner of Inland Revenue* (2001) 20 NZTC 17096 at 17,102.

[13] *Suzuki New Zealand Limited v. Commissioner of Inland Revenue* (2001) 20 NZTC 17096 at 17,102.

[14] The recent decision of the New Zealand Court of Appeal in *Commissioner of Inland Revenue v. Motorcorp Holdings Ltd & Ors* CA17/04 7 March 2005 found that the earlier decision by the New Zealand High Court in *Motorcorp Holdings Ltd & Ors v. Commissioner of Inland Revenue* (2004) NZTC 18,437 that the payment from the manufacturer to the distributor was '…made pursuant to a contract of insurance outside the GST Act…' (at 18,452) was incorrect. The Court of Appeal found that the offshore warranty arrangement was not insurance and that the circumstances were the same as in *Suzuki*. The credits/payments in question preceded legislative change in New Zealand in 2002, the effect of which is to levy GST on warranty services of the type subject of the *Suzuki* and *Motorcorp* case at the rate of zero percent. Because of this, and as the Court found that the circumstances were the same as in *Suzuki,* there was no need for the Court to discuss the *Suzuki* decision other than to apply it to find that the payments were subject to GST.

The *Toyota* case

22. In *Chief Executive Officer of Customs v. AMI Toyota Ltd*[15] (*Toyota*) the Full Federal Court of Australia considered similar arrangements to those that existed in *Suzuki*. The *Toyota* case concerned the value of imported goods for the purposes of the *Customs Act 1901.* At issue was whether a component of the cost of the vehicles supplied by Toyota Japan to Toyota Australia that related to the cost of warranty repairs was included in the 'price' upon which the duty would be calculated. That component would not be included in the 'price' if it was a 'value unrelated matter'. It would be a value unrelated matter if the activity to which it related was something undertaken by the purchaser on its own account. Hence, the main question was whether '…warranty costs…were costs, charges or expenses in relation to activities undertaken by the purchaser [distributor] on the purchaser's [distributor's] own account…'.[16] The Court had to decide whether the activities, the warranty repairs, were something the distributor undertook on its own account, that is, did the distributor do the repairs for itself or for someone else, such as the manufacturer. On this point the Court found:

> The giving and honouring of obligations undertaken by Toyota Australia to its customers is an *activity* undertaken by Toyota Australia on its own account in relation to the goods. Toyota Australia has undertaken, inter alia, a several liability under the warranty, and is therefore itself liable to consumers in respect of warranty repairs. Thus, when Toyota Australia provides warranty repairs, or reimburses a dealer for providing warranty repairs, it is doing so on its own account in relation to the goods, rather than in any other capacity. There is nothing in the Toyota Warranty Policy, in the individual contracts of sale or the importer agreements to the effect that Toyota Australia is giving or honouring its warranty obligations as agent for Toyota Japan, or on any account other than its own. The requirement under the importer agreements that Toyota Australia be reimbursed in respect of those costs by Toyota Japan does not alter that fact. Nor does the fact that the warranty obligations of Toyota Japan and Toyota Australia are joint and several alter the fact that the warranty repairs for which Toyota Australia is liable is a liability on Toyota Australia's own account.[17]

23. As stated by the Court, in coming to this conclusion it considered not only the Toyota Warranty Policy but also the importer agreements and the individual contracts of sale by Toyota Australia, which are the types of documents underlying offshore warranty chargeback arrangements (see paragraph 4).[18] Having considered these documents it concluded that 'the warranty repairs for which Toyota Australia is liable is a liability on Toyota Australia's own account'.[19] That is, the Court regarded repairs carried out by Toyota Australia as satisfying its own and no other obligations under the warranty arrangements. The Court concluded, as quoted above, that there was 'nothing … to the effect that Toyota Australia is … honouring its warranty obligation … on any account other than its own'.[20] That is, the Court concluded that the distributor, in providing warranty repairs, is only doing so because of the warranty obligation it owes the customer.

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[15] (unreported) [2000] FCA 1343.
[16] *Chief Executive Officer of Customs v. AMI Toyota Ltd.* [2000] FCA 1343 (unreported) at paragraph 37.
[17] *Chief Executive Officer of Customs v. AMI Toyota Ltd.* [2000] FCA 1343 (unreported) at paragraph 40.
[18] Note that in *Toyota* the arrangements considered were materially the same as those the subject of this Determination, whereas in *Suzuki* the Court discussed the warranty from the manufacturer as being to the distributor.
[19] *Chief Executive Officer of Customs v. AMI Toyota Ltd.* [2000] FCA 1343 (unreported) at paragraph 40.
[20] *Chief Executive Officer of Customs v. AMI Toyota Ltd.* [2000] FCA 1343 (unreported) at paragraph 40.

24. In *Suzuki* the question was whether the distributor made a supply to the non-resident manufacturer when it, the distributor, undertook the warranty repairs. That is, in performing the warranty repairs, was the distributor doing them for the manufacturer? This is the converse of the question in *Toyota* of whether the distributor was undertaking the repair services for itself only.

25. Hence, in both *Suzuki* and *Toyota* at issue was whether the distributor undertook the repair services for itself or for the manufacturer. In *Suzuki* the court decided that the distributor undertook the repair services both for itself and for the manufacturer. That is, in doing the repairs it was meeting the obligations it owed to the customer under the warranty from the distributor to the customer but it was also doing them on behalf of the manufacturer so the manufacturer met its obligations under the offshore warranty. In *Toyota* the court concluded that the distributor undertook the repairs on its own account and only on its own account. That is, the Court concluded that the distributor did the repairs for itself and for no-one else to meet the obligations it owed the customer under the warranty from the distributor to the customer, and that it did not do the repairs on behalf of the manufacturer.

26. In *Suzuki* the finding that there was a supply by the distributor to the manufacturer of the repair services depended on the finding that the distributor undertook the repairs on behalf of the manufacturer as well as for itself.

27. The finding in *Toyota* that the distributor only undertook the repair services for itself and was not doing them for anyone else – as the court put it: 'There is nothing in the Toyota Warranty Policy, in the individual contracts of sale or the importer agreements to the effect that Toyota Australia is giving or honouring *its* warranty obligations as agent for Toyota Japan, or on any account other than its own.' – is different from the finding in *Suzuki* that the distributor was performing the repairs on behalf of the manufacturer.

28. The finding in *Toyota* that the distributor only undertakes the warranty repairs on its own account because of the obligation it owes to the customer, and is not undertaking the repairs on behalf of the manufacturer, demonstrates that it is possible to reach a conclusion on the documents and facts related to particular offshore warranty chargebacks different from that in *Suzuki*. Where the arrangements have the features set out above, we consider that the distributor carries out the repairs on its own account only, and there is no supply from the distributor for which the payment is consideration. Accordingly, in our view there is no taxable supply from the distributor and no GST payable in relation to the payment from the manufacturer to the distributor.

29. Our view that the payment from the manufacturer to the distributor is not consideration for a supply from the distributor is also consistent with the policy intent. The cost of the importation of the cars by the distributor includes a component for the expected warranty costs. The distributor has already paid GST on this component of the cost of the importation. If the distributor were required to account for GST on the payment from the manufacturer to the distributor there would be a double impost of GST. We also note that after the *Suzuki* decision the New Zealand GST legislation was amended so that such payments would not be subject to GST to achieve this policy outcome.

Example: Repairs made when there is an offshore warranty and a domestic warranty

30. Oz Co is registered for GST and is the Australian distributor of a non-resident manufacturer's (NRM) cars. NRM is not registered for GST and is not grouped with Oz Co for GST purposes.[21] Oz Co distributes the cars in Australia in its own right and not as agent for NRM. NRM provides a warranty to Oz Co for the cars that Oz Co purchases from NRM. This is the offshore warranty. The written agreement specifies the types of repairs and the period covered by the warranty. The agreement between NRM and Oz Co requires Oz Co to give a warranty in relation to the cars that it on-sells in terms at least as comprehensive as the warranty from NRM to Oz Co. Oz Co does so; this is the domestic warranty.

31. The written agreement between NRM and Oz Co specifies the standards to be complied with when making repairs covered by the warranty from NRM to Oz Co. The written agreement establishes that NRM will pay Oz Co an amount calculated by reference to a schedule of costs for parts and labour incurred by Oz Co in making the repairs.

32. Oz Co engages, under a separate agreement, its authorised dealers to perform the repairs. This agreement also sets out the amount dealers will be paid for particular repairs. When a customer's car requires repairs, the customer takes the car to an authorised dealer. The dealer performs the repairs and is paid for this by Oz Co. The amount NRM pays Oz Co, as set by the agreement between them, is less than the amount that Oz Co pays its dealers.

33. In relation to any particular repair there is a supply of repair services by the dealer to Oz Co under the agreement between them. Oz Co pays the dealer the amount specified in the agreement between them for that type of repair. As the other requirements of section 9-5 of the GST Act are met, this is a taxable supply by the dealer. It is also a creditable acquisition by Oz Co.

34. The offshore warranty agreement between Oz Co and NRM specifies the amount that Oz Co is entitled to be paid in relation to parts and/or labour for each type of repair. Oz Co includes the amount for each repair in the monthly invoice it sends to NRM for repairs carried out in that month that are covered by the offshore warranty. NRM pays that amount to Oz Co. There is no supply made by Oz Co to NRM and the payment is not consideration for a supply. The payment from NRM to Oz Co is not subject to GST.

Date of effect

35. This draft Determination represents the preliminary, though considered view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Determination is officially released, it will explain our view of the law as it applies from 1 July 2000.

36. The final Determination will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

[21] GST is generally not payable on supplies made within a GST group of entities: see sections 48-40 and 48-50 of the GST Act. Also, NRM and Oz Co cannot group for GST purposes as NRM is not registered (paragraph 48-10(1)(c)).

37. If the final public ruling conflicts with a previous private ruling that you have obtained, the public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the date of issue of the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Your comments

38. We invite you to comment on this draft Goods and Services Tax Determination. Please forward your comments to the contact officer by the due date.

Due date:	**15 July 2005**
Contact officer:	**Ian Underwood**
	Trent Jakubowski
E-mail address:	**ian.underwood@ato.gov.au**
	trent.jakubowski@ato.gov.au
Telephone:	**(07) 3213 5698**
	(02) 6216 1915
Facsimile:	**(07) 3213 5055**
	(02) 6216 2040
Address:	**GPO Box 920**
	Brisbane Qld 4001

Commissioner of Taxation
1 June 2005

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Related Rulings/Determinations:

GSTR 1999/1; GSTR 2003/D7; GSTD 2005/D3

Subject references:

- Australia
- consumption outside Australia
- GST-free
- GST-free supplies
- international
- non-resident
- recipient
- services
- supplier
- supplies of things other than goods or real property
- taxable supplies

Legislative references:

- ANTS(GST)A99 9-5
- ANTS(GST)A99 38-190(1)
- ANTS(GST)A99 38-190(3)
- ANTS(GST)A99 48-10(1)(c)
- ANTS(GST)A99 48-40
- ANTS(GST)A99 48-50
- TAA 1953 37

Case references:

- Chief Executive Officer of Customs v. AMI Toyota Ltd (unreported) [2000] FCA 1343
- Commissioner of Inland Revenue v. Motorcorp Holdings Ltd & Ors CA CA17/04
- LNC (Wholesale) Pty Ltd v. Collector of Customs (1988) 17 FCR 154
- Motorcorp Holdings Ltd v. Commissioner of Inland Revenue (2004) NZTC 18,437

- Suzuki New Zealand Limited v. Commissioner of Inland Revenue (2001) 20 NZTC 17096

- WHA Ltd & ors v. Customs and Excise Commissioners [2004] BVC 485

ATO references

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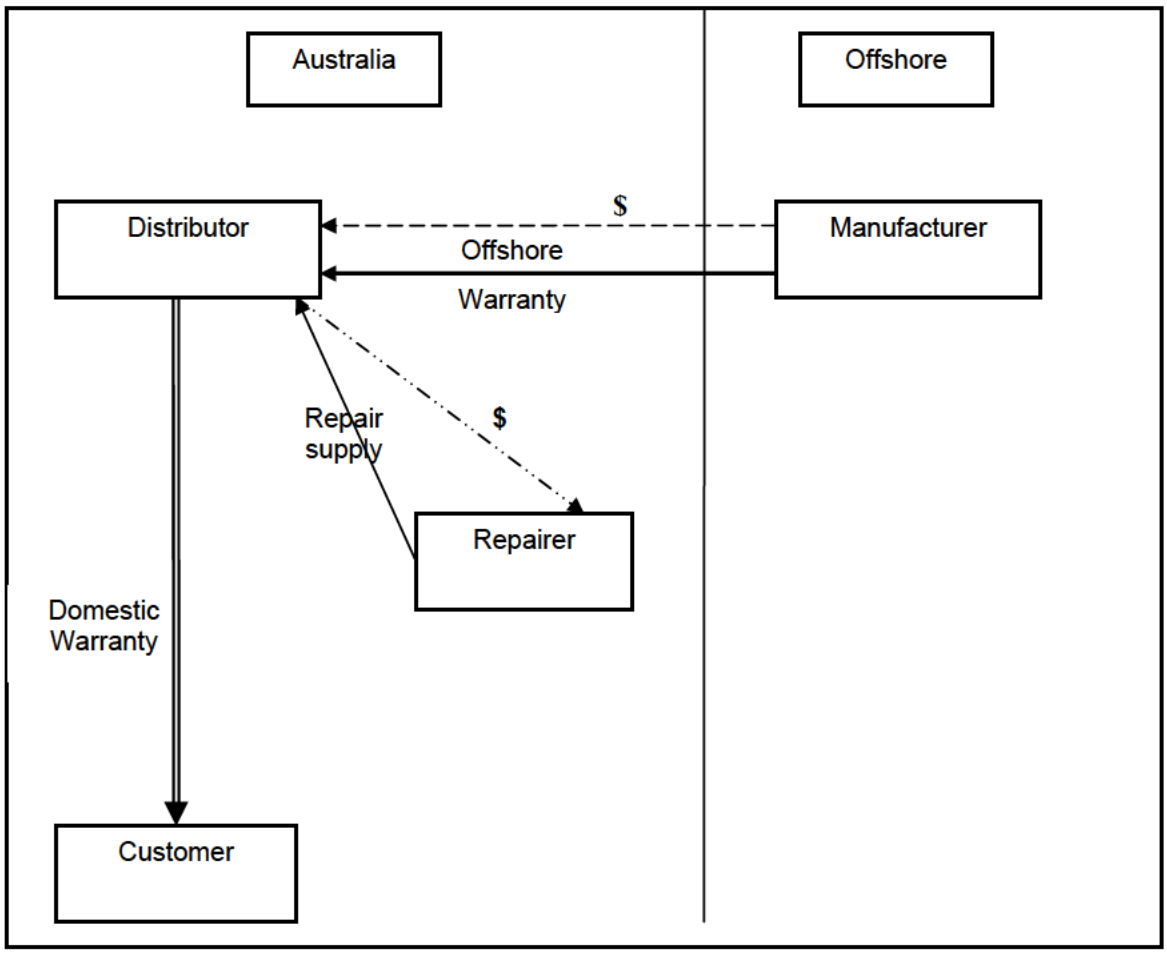
Attachment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