GSTD 2006/1 - 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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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 was published prior to 1 July 2010 and was a public ruling for the purposes of former section 37 of the **Taxation Administration Act 1953** and former section 105-60 of Schedule 1 to the **Taxation Administration Act 1953.***

*From 1 July 2010, this document is taken to be a public ruling under Division 358 of Schedule 1 to the **Taxation Administration Act 1953.***

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

*[**Note:** This is a consolidated version of this document. Refer to the Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

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.[1] 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 or both. Cars supplied by a manufacturer directly to customers in Australia may be supplied with a warranty from the manufacturer.

[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.

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.

4. This Determination applies where 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; and
- requires the non-resident manufacturer to pay the Australian distributor an amount in respect of the repairs effected under the Australian distributor's warranty.

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 a warranty given by a non-resident manufacturer as an *offshore warranty*.

6. Any warranty the Australian distributor may give 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. 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 a number of 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.

[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.

Explanation

8. In many cases the GST liabilities and entitlements of the parties to a transaction can be determined by reference to their written contract. However, there are situations in which circumstances other than the written contract between parties may also be relevant to correctly characterising attributes of the transaction between them.[3]

9. In the United Kingdom case *Customs and Excise Commissioners v. Reed Personnel Services Ltd.* (*Reed*) Laws J found on the one hand, that:

> In many situations, …, the contract will on the facts conclude any VAT issue, as where there is a simple agreement for the supply of goods or services with no third parties involved. But that is a circumstance, not a rule.[4]

On the other, he found that:

> There may be cases, generally (perhaps always) where three or more parties are concerned, in which the contract's definition (however exhaustive) of the parties' private law obligations nevertheless neither caters for nor concludes the statutory question, what supplies are made by whom to whom. …In principle, the nature of a VAT supply is to be ascertained from the whole facts of the case. It may be a consequence, but it is not a function, of the contracts entered into by the relevant parties.[5]

If there are three or more parties involved, it is appropriate to look at the 'whole facts of the case'. This Determination, for example, involves an Australian distributor, an Australian customer and a non-resident manufacturer. Because of this, it is appropriate to look at facts and circumstances other than, and additional to, the contracts. Such circumstances include the behaviour of the parties.

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. 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.

11. If the non-resident manufacturer, itself, engaged an entity such as a distributor or third party to make the repairs required under the offshore warranty, this entity would be making a supply of repair services to the manufacturer.[6] 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.[7] 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 the agreed rate for a particular repair, the non-resident manufacturer meets its obligations under the warranty.

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[3] See for instance *LNC (Wholesale) Pty Ltd v. Collector of Customs* (1988) 17 FCR 154 (*LNC*) at 160 and 166, *Chief Executive Officer of Customs v. AMI Toyota Ltd* (unreported) [2000] FCA 1343 (*Toyota*) at paragraph 38, and the United Kingdom case *Customs and Excise Commissioners v. Reed Personnel Services Ltd* [1995] BVC 222; [1995] STC 588 (*Reed*) at 595.
[4] *Reed* at 595.
[5] *Reed* at 595.
[6] [Omitted.]
[7] See *Toyota* at paragraphs 40 and 41.

12. Circumstances surrounding a warranty's contractual arrangements, and the way these arrangements are carried out, may indicate that the repairs are something the distributor does on its own account. This would be indicated if 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 that it gave to the customer; and
- 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.

13. In these circumstances 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.

14. This issue has been considered in the New Zealand case *Suzuki New Zealand Limited v. Commissioner of Inland Revenue* (2001) 20 NZTC 17096 (*Suzuki*). Similar arrangements were also considered in the Australian case *Toyota*. These cases are discussed below, starting at paragraph 17.

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 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.[8]

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 *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.

[8] See *Toyota* 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.[9] 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.[10]

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.[11]

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 ...'.[12]

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'.[13] 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.[14]

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[9] 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.
[10] *Suzuki* at 17,102.
[11] *Suzuki* at 17,102.
[12] *Suzuki* at 17,102.
[13] *Suzuki* at 17,102.
[14] *Suzuki* at 17,102.

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.[15] However, this particular factual conclusion does not establish a general principle that there is a supply of repair services from distributors to manufacturers under offshore warranty chargebacks. Indeed, the decision in *Reed* emphasises the point that, if three or more parties are involved it is perhaps the more general situation that:

> …the nature of a VAT supply is to be ascertained from the whole facts of the case….[the nature of a VAT supply] may be a consequence, but it is not a function, of the contracts entered into by the relevant parties.[16]

A different conclusion about the facts is possible, as shown in the *Toyota* case.

The *Toyota* case

22. In *Toyota*[17] 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...'.[18] 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

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[15] The 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 18437 that the payment from the manufacturer to the distributor was '...made pursuant to a contract of insurance outside the GST Act...' (at 18452) 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.

[16] *Reed* at 595.

[17] (unreported) [2000] FCA 1343.

[18] *Toyota* at paragraph 37.

> 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.[19]

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).[20] 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'.[21] 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'.[22] 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.

24. 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 the distributor was meeting the obligations it owed to the customer under the warranty from the distributor to the customer. However, the distributor was also found to be doing them on behalf of the manufacturer so that the manufacturer met its obligations under the offshore warranty. In *Toyota,* on the other hand, 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.

25. 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 not only for itself but also on behalf of the manufacturer.

26. In *Toyota* the court found 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.[23]

This is different to the finding in *Suzuki* that the distributor was performing the repairs on behalf of the manufacturer.

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[19] *Toyota* at paragraph 40.
[20] 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.
[21] *Toyota* at paragraph 40.
[22] *Toyota* at paragraph 40.
[23] *Toyota* at paragraph 40.

27. 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*. If an arrangement has the features discussed in this Determination, particularly at paragraphs 4 and 12, 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 those circumstances, 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.

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

28. *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 an associate of Oz Co or grouped with Oz Co for GST purposes. Oz Co distributes the cars in Australia in its own right and not as agent for NRM. NRM provides a warranty for the cars that Oz Co purchases from NRM. This is the offshore 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. Oz Co does so; this is the domestic warranty.*

29. *One of the warranty documents is a written agreement between NRM and Oz Co that specifies the types of repairs covered, the period of the warranty and the standards to be complied with when making repairs covered by the warranty from NRM. The written agreement establishes that NRM will pay Oz Co an amount calculated by reference to a schedule of costs for making the repairs.*

30. *Oz Co engages, under a separate agreement, its authorised dealers to perform the repairs. This agreement sets out the amount Oz Co will pay dealers 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.*

31. *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 A New Tax System (Goods and Services Tax) Act 1999* (*GST Act) are met, this is a taxable supply by the dealer. It is also a creditable acquisition by Oz Co.*

32. *The agreement between Oz Co and NRM specifies the amount that Oz Co is entitled to be paid for each type of repair covered by the offshore warranty. 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

33. This Determination applies [to tax periods commencing] both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

34. [Omitted.]

Commissioner of Taxation
19 April 2006

Previous draft:

GSTD 2005/D2

Related Rulings/Determinations:

TR 2006/10

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)A 1999 9-5
- Customs Act 1901
- Trade Practices Act 1974
- TAA 1953 Sch 1 Div 358

Case references:

- Chief Executive Officer of Customs v. AMI Toyota Ltd (unreported) [2000] FCA 1343
- Commissioner of Inland Revenue v. Motorcorp Holdings Ltd & Ors CA17/04 7 March 2005
- Customs and Excise Commissioners v. Reed Personnel Services Ltd [1995] BVC 222; [1995] STC 588
- LNC (Wholesale) Pty Ltd v. Collector of Customs (1988) 17 FCR 154
- Motorcorp Holdings Ltd & Ors v. Commissioner of Inland Revenue (2004) NZTC 18437
- Suzuki New Zealand Limited v. Commissioner of Inland Revenue (2001) 20 NZTC 17096

ATO references

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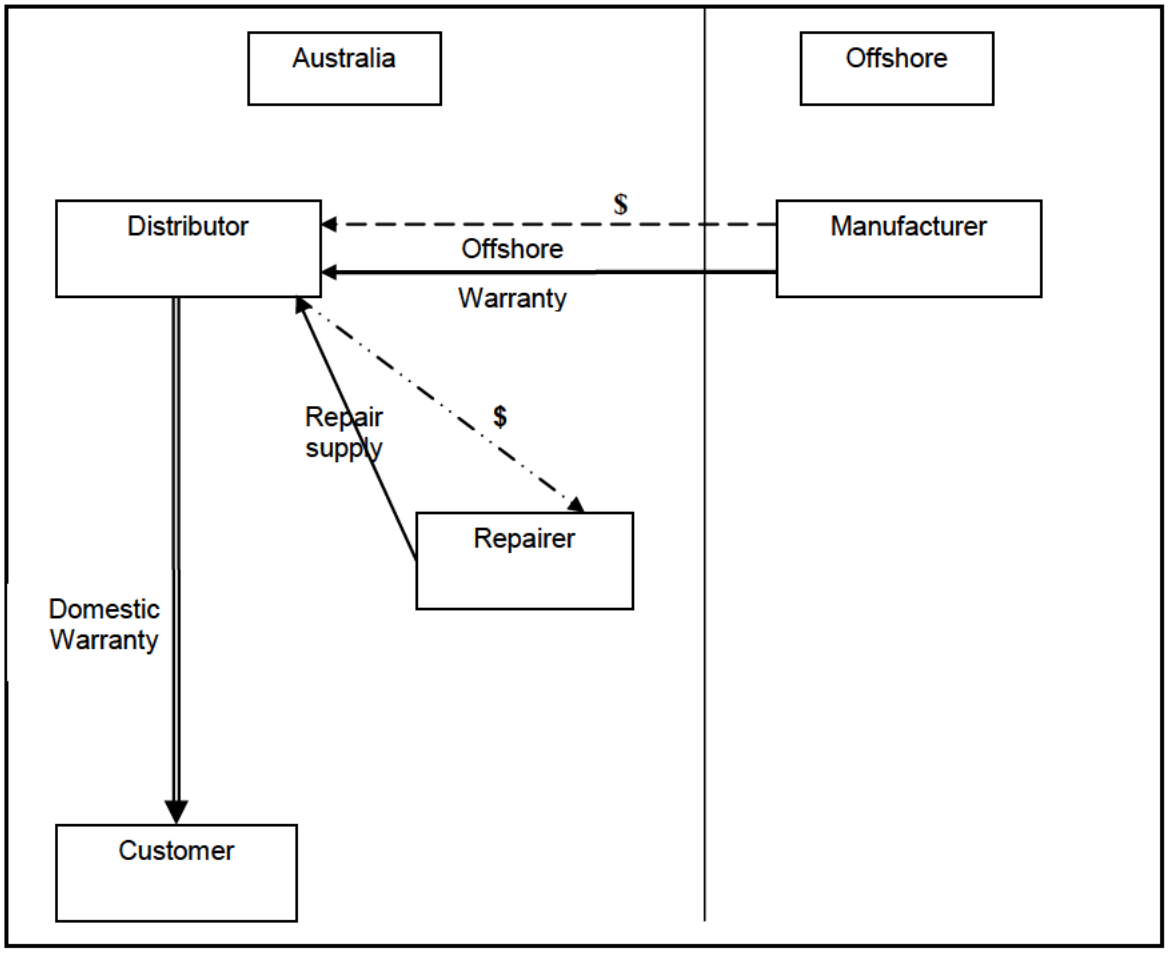
Attachment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