

ADMINISTRATIVE LAW - judicial review - customs - antidumping - whether determination by Authority involved error of law - whether material injury to Australian industry was causally linked to dumped exports from overseas countries.

Administrative Decisions (Judicial Review) Act 1977

Anti-Dumping Authority Act 1988: ss. 7, 8, 10

*Customs Act 1901: ss. 269TD(2), 269TG, 269TJ, 269TAB, 269TAC(1),
(2), (12), (13)*

Customs Tariffs (Anti-Dumping) Act 1975

Judiciary Act 1903: s. 39B

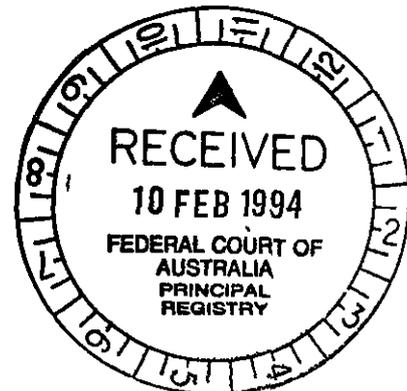
MINISTER FOR SMALL BUSINESS, CONSTRUCTION & CUSTOMS, ANTI-DUMPING
AUTHORITY, COMPTROLLER-GENERAL OF CUSTOMS v LA DORIA DI DIODATA
FERRAIOLLI S.P.A.

G428 of 1993

BLACK C.J., LOCKHART and WHITLAM JJ.

10 FEBRUARY 1994

SYDNEY



IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G428 of 1993
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE
FEDERAL COURT OF AUSTRALIA

BETWEEN: MINISTER FOR SMALL BUSINESS,
CONSTRUCTION & CUSTOMS
First Appellant

ANTI-DUMPING AUTHORITY
Second Appellant

COMPTROLLER-GENERAL OF
CUSTOMS
Third Appellant

AND: LA DORIA DI DIODATA
FERRAIOLLI S.P.A.
Respondent

COURT: Black C.J., Lockhart and Whitlam JJ.
DATE: 10 February 1994
PLACE: Sydney

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. Order 1 made by Lee J. on 11 June 1993 be set aside;
2. Order 2 made by Lee J. be set aside;
3. Order 3 made by Lee J. be confirmed;
4. Order 4 made by Lee J. be set aside and in lieu thereof it be ordered that the matter be remitted to the first and second respondents for the purpose of determining, pursuant to s. 8(5) and s. 10(5) of the *Customs Tariff (Anti-*

Dumping) Act 1975, the amount of dumping duty and countervailing duty payable in respect of canned tomatoes exported from Italy to Australia pursuant to the decisions and directions of the first respondent made on 21 April 1992.

5. Order 5 made by Lee J. be set aside and in lieu thereof it be ordered that La Doria pay three-quarters of the costs of the appellants of the proceedings at first instance and that La Doria pay the costs of the appellants of this appeal.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G428 of 1993
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE
FEDERAL COURT OF AUSTRALIA

BETWEEN: MINISTER FOR SMALL BUSINESS,
CONSTRUCTION & CUSTOMS
First Appellant

ANTI-DUMPING AUTHORITY
Second Appellant

COMPTROLLER-GENERAL OF
CUSTOMS
Third Appellant

AND: LA DORIA DI DIODATA
FERRAIOLLI S.P.A.
Respondent

COURT: Black C.J., Lockhart and Whitlam JJ.
DATE: 10 February 1994
PLACE: Sydney

REASONS FOR JUDGMENT

BLACK C.J. and LOCKHART J.

This appeal from the judgment of a single judge of the Court (Lee J.) concerns the validity of decisions of the Minister for Small Business, Construction & Customs, the first appellant ("the Minister") and of the Anti-Dumping Authority, the second appellant ("the Authority"), which related to the imposition of dumping and countervailing duties with respect to canned tomatoes exported from Italy to Australia.

The decisions were made as part of an investigation, initially by the Australian Customs Service ("Customs") and then

by the Authority, into the export from Italy, Spain, Thailand and the People's Republic of China to Australia of canned tomatoes (they are either whole tomatoes - peeled or unpeeled - or in pieces or crushed).

On 19 July 1991 the Australian Canned Foods Information Service ("the CFIS") lodged an application with Customs for anti-dumping and countervailing action against exports of allegedly dumped and subsidized canned tomatoes exported from Italy, Spain, Thailand and China. The CFIS lodged the application on behalf of various Australian tomato processors who claimed that dumped and subsidized exports from those countries had caused material injury through loss of sales, loss of market share, inability to recover full increases in costs, reduced production, increased stocks and reduced profitability. It was claimed that as a result of dumped imports, tomato growers had lost sales and might require financial support.

On the prima facie evidence available to Customs, the application was accepted for inquiry and formally notified in the press, in the Gazette and in Australian Customs Notice No. 91/134 on 27 August 1991.

Customs stated in its preliminary report of 5 December 1991 that:-

" . *canned tomatoes exported from Italy, Spain and Thailand were subsidised;*

- . canned tomatoes were exported from Italy, Spain, Thailand and China at dumped prices;
- . there has been material injury to the Australian industry producing canned tomatoes;
- . material injury to the Australian industry can be causally linked to dumped and/or subsidised exports of canned tomatoes from Italy, Spain, Thailand and China; and
- . there is presently a threat of material injury to the Australian industry from exports of canned tomatoes at dumped and/or subsidised prices from Italy, Thailand and China."

Customs thereupon announced the following preliminary findings:

- ". there are not sufficient grounds for the publication of a countervailing duty notice for canned tomatoes exported to Australia from China;
- . there are sufficient grounds for the publication of a dumping duty notice for canned tomatoes exported to Australia from China;
- . there are sufficient grounds for the publication of a countervailing duty notice and a dumping duty notice for canned tomatoes exported to Australia from Italy, Spain and Thailand; and
- . it is appropriate to take securities under s. 42 [of the Customs Act 1901 ('the Customs Act')] in respect of any dumping or countervailing duty that may become payable upon the importation of canned tomatoes exported from Italy, Spain, Thailand and China to Australia."

The preliminary findings of Customs in December 1991 were referred to the Authority pursuant to s. 269TD(2)(b) of the *Customs Act* on 12 December 1991.

The Authority was required to hold an inquiry into the matter referred to it by Customs and to report to the Minister pursuant to s. 7 of the *Anti-Dumping Authority Act* 1988 ("*the ADA Act*"):-

- . recommending whether a dumping and/or countervailing duty notice should be published and the extent of the duty to be levied under the *Customs Tariffs (Anti-Dumping) Act* 1975 ("*the Anti-Dumping Act*");
- . recommending whether the Minister ought to be satisfied as to the matters in respect of which the Minister is required to be satisfied before such a notice can be published; and
- . setting out the reasons for the recommendations.

Pursuant to s. 10 of the *ADA Act* the Authority in performing its functions under s. 7 thereof was obliged to have regard to:

- (a) the Commonwealth Government's policy in relation to anti-dumping matters; and

(b) Australia's obligations under the General Agreement on Tariffs and Trade ("GATT");

in each case not to use the imposition of duties under the *Anti-Dumping Act* to assist import competing industries in Australia or to protect industries in Australia from the need to adjust to changing economic conditions.

The Authority conducted its inquiries and made findings and recommendations to the Minister in April 1992. The Authority made the following findings:-

- . Significant assistance was being provided for the production and export of canned tomatoes in Italy and Spain.
- . Exports from Italy in 1991 were also at significant dumping margins.
- . The respondent, La Doria Di Diodata Ferraiolli S.P.A. ("La Doria"), as the producer of products processed from fruit supplied by growers within the European Community, ("EC") was the recipient of "production aid" set by the Commission of the European Commission ("the Commission"). The Authority had regard to Commission Regulation (No 2080/90 and 2037/91) which set the amount of production aid payable to Italian producers of canned tomatoes.

- . Having examined the Commission Regulations, the Authority found no reference therein to the subsidy "being payable for the benefit of any party other than the recipients of such subsidy" and, therefore, considered that the production aid paid to La Doria was a "countervailing subsidy" within the meaning of s. 269TJ of the *Customs Act*.

- . The production aid, although compensation for the high cost of tomatoes set by the Commission, was a separate revenue item received after manufacturing costs were incurred and should not be treated as "cost offset".

- . Sales of like goods in Italy by La Doria were in the ordinary course of trade, so the Authority proceeded to assess La Doria's ability to produce and sell the goods at a profit without the benefit of the production aid, and did so as part of determining whether the sales took place in the situation that made the sales not suitable for use in determining the price paid for those goods in the ordinary course of trade in the Italian market: an approach which the Authority found was authorized by s. 269TAC(2)(a)(ii) of the *Customs Act*.

- . The Authority therefore considered that sales in Italy were not suitable for use in assessing normal values under s. 269TAC(1) of the *Customs Act* and was satisfied that s.

269TAC(2)(a)(ii) should be applied.

- . Only a small quantity of exports from Thailand were at dumped prices, but a significant proportion received assistance in the form of lower financing costs for export.
- . Exports from China in 1991 were found to be dumped with margins of about 10%.
- . Seven manufacturers in Australia produce canned tomatoes from locally grown tomatoes. Three of those manufacturers gain 90% of the sales of the Australian made products. No Australian manufacturer exports its products. Australian growers of processing tomatoes receive the same price for tomatoes used in canned tomatoes as for tomatoes used in any other tomato product. Historically the price paid to growers for processing tomatoes has been determined by the return to processors from sales of products other than canned tomatoes. Only 20% of processing tomatoes are produced as canned tomatoes.
- . The estimated weight of canned tomatoes sold in the Australian market in 1991 was 37,000 tonnes. Until 1989 Australian manufacturers supplied almost three-quarters of the goods sold in that market. Since 1989 the market has been shared approximately equally between Australian goods and imported goods. In 1989 Australian tomato growers

harvested less than the usual tonnage of processing tomatoes, and Australian manufacturers imported processing tomatoes and manufactured them as Australian goods. The shortfall stimulated an increase in the import of canned tomatoes. In 1989 the weight of canned tomatoes sold in the Australian market increased by 50%. The Australian market contracted in 1990, but in 1991 it was still 40% greater than the market in 1988.

- . While the market for canned tomatoes has grown significantly, the share held by Australian producers has declined. In 1991, sales by Australian producers fell, prices declined, profits and profitability sharply fell and prices paid to growers fell.
- . The volume of subsidized and dumped imports has almost trebled since 1988, the market share held by those imports has increased significantly and the prices of imported canned tomatoes have undercut the prices of Australian processors.
- . Subsidized and dumped imports caused material injury to the Australian industry. Given the rapid increase in imports during the inquiry period, in the absence of action, subsidized and dumped imports would continue to cause material injury to the industry.

- . Dumped imports from Spain and Thailand had not caused material injury given the small dumping margins found and the small volume of dumped imports from those countries in 1991.

- . However, exports of canned tomatoes from Italy, Spain and Thailand received significant assistance, and therefore countervailing action should be taken against exports from those countries.

- . There were significant exports from Italy and China at dumped prices.

In its report to the Minister, the Authority made the following statements:

"The assessment of normal values in Italy is complicated by the existence of subsidies.

Italian manufacturers claimed that the production aid received should be treated as a cost offset and thus used to reduce the total cost to make and sell canned tomatoes.

The Authority acknowledges that canners are compensated for the high cost of tomatoes. However, the fact remains that the cost of purchasing tomatoes locally is reflected in the company accounts as a cost item.

The Authority notes that the production aid is received as a separate revenue item well after the company incurs its manufacturing costs. It therefore does not accept that the production aid paid should be treated as a cost offset.

The Authority has compared actual costs incurred with prices paid to assess whether sales were made at a profit.

This comparison reveals that costs to make and sell were greater than revenue received: that is, that the canners operate at a loss. However, the production aid received was greater than this loss. The Authority is therefore satisfied that the losses are recovered within a reasonable time and that subsection 269TAC(12) cannot be used to assert that sales are not in the ordinary course of trade.

The payment of the production aid has, however, distorted domestic selling prices to the extent that canned tomatoes are being consistently sold at prices less than the companies' costs to make and sell the goods. The Authority therefore considers that sales in Italy are 'not suitable for use' in assessing normal values under subsection 269TAC(1) of the Customs Act, as provided for in subparagraph 269TAC(2)(a)(ii) of the Act.

Insufficient information was available to assess normal values using sales to third countries. However, reliable information on costs to make and sell canned tomatoes was available.

The Authority has therefore assessed normal values under paragraph 269TAC(2)(c) of the Customs Act, using cost information for the three companies visited. An allowance for profit was made in this assessment.

Allowances were made under subsection 269TAC(9) for differences in freight and credit terms between sales in Italy and exports to Australia.

Normal values for other exporters which did not supply information were assessed under subsection 269TAC(6) using the lowest normal value assessed for the companies which supplied information."

The Authority thus identified the circumstance that made sales in the domestic selling market of La Doria not suitable for use in determining the price paid for those goods in the ordinary course of trade for home consumption in Italy (s. 269TAC(1)) as being the payment of the production aid which distorted domestic selling prices to the extent that canned tomatoes had been consistently sold at prices less than the canning companies' costs of manufacturing and selling them.

The Authority recommended to the Minister that the Minister:-

- . impose countervailing duties on and take anti-dumping action against exports of canned tomatoes from Italy;
- . impose countervailing duties on exports of canned tomatoes from Spain and Thailand;
- . take anti-dumping action against exports of canned tomatoes from China; and
- . not take anti-dumping action against exports of canned tomatoes from Spain and Thailand.

The Minister adopted the reasoning of the Authority in satisfying himself that s. 269TAC(2)(a)(ii) was the relevant provision to establish the normal value of the goods. The

Authority assessed the normal value for goods exported by La Doria pursuant to s. 269TAC(2)(c) and the Minister adopted that assessment as his determination of the normal value of the goods.

In April 1992 the Minister imposed a countervailing duty upon canned tomatoes exported to Australia from Italy, Spain and Thailand and an anti-dumping duty on canned tomatoes exported to Australia from Italy and China.

La Doria is incorporated in Italy and it carries on business as a processor of fruit products and seller of those products for the Italian and European markets. For approximately 20 years, La Doria has exported canned tomatoes from Italy to Australia. (The parties have treated tomatoes as fruit, not vegetables, an interesting question which need not be decided in this case. We shall proceed on the basis that tomatoes are fruit). These exports have represented a minor proportion of Australian imports of that product.

La Doria instituted these proceedings pursuant to the *Administrative Decisions (Judicial Review) Act 1977* ("the ADJR Act") and s. 39B of the *Judiciary Act 1903*, asserting that the recommendations of the Authority to the Minister and the decisions of the Minister to impose countervailing and dumping duties on canned tomatoes exported from Italy to Australia involved errors of law, and seeking orders setting aside those decisions and restraining the Comptroller-General of Customs from

collecting the duties imposed.

Australia's anti-dumping legislation and its relationship to Australian international obligations under GATT have been discussed in many decisions of this Court. Certain of them were referred to by the primary Judge at p. 8 of his reasons for judgment. We would add to his Honour's citation of cases, references to *Enichem Anic SRL v Anti-Dumping Authority* (1992) 39 FCR 458; *Hyster Australia Pty Limited v Anti-Dumping Authority* (1993) 112 ALR 582; *Castle Bacon Pty Limited v Anti-Dumping Authority*, Gummow J., unreported, 9 November 1992; *Powerlift (Nissan) Pty Limited v Minister of State for Small Business, Construction and Customs*, Hill J. (91993) 40 FCR 332; HKC Steele "The Australian Antidumping System" in J H Jackson and E A Vermulst (eds) *Antidumping Law and Practice* 251-258, 273-380.

The *Anti-Dumping Act* was enacted in 1975 to give effect to the initial GATT Antidumping Code. The Act was revised in 1981 (Act No 66 of 1981) to facilitate Australia becoming a signatory to the revised GATT Codes on Antidumping and Subsidies and Countervailing Duties. The *Anti-Dumping Act* is to be read with the *Customs Act*, which confers upon Customs powers and functions for the administration of customs matters.

Under the *Anti-Dumping Act*, antidumping and countervailing duties are special duties of Customs. The power to charge and collect them arises from the *Customs Act*.

An antidumping duty is an extra import duty imposed on imported goods in a sum equal to the amount by which the amount of the export price of the goods (i.e. what they are sold for in Australia) is less than the amount of the normal value of the goods (i.e. what they are sold for in the country where they are produced). Antidumping duties are imposed by the Minister gazetting a notice containing a declaration that s. 8 of the *Anti-Dumping Act* is to apply to goods of a kind which have been, or will be, exported to Australia. The notice requires duties to be charged, collected, and paid on the goods, in effect making the exported goods less competitive on the Australian market. The amount of the dumping duty should not be greater than is necessary to prevent injury to the Australian market for those goods.

A countervailing duty is an extra import duty imposed on goods imported into Australia in a sum equal to the amount of the subsidy, bounty or other financial assistance paid to the producer of the goods in a foreign country. Countervailing duties in effect increase the price of importing the goods into Australia, making them less competitive on the Australian market. Countervailing duties should not be of a greater amount than is necessary to prevent injury to the Australian market for the goods in question.

We shall state the relevant provisions of the applicable legislation.

Dumping duty is imposed under s. 8 of the *Anti-Dumping Act*. Section 8(4) establishes the dumping duty payable in respect of goods as a sum equal to the amount by which the amount of the export price of the goods is less than the amount of the normal value of the goods. The export price of the goods is determined under s. 269TAB of the *Customs Act* and generally is the purchase price of the goods excluding the costs of exporting those goods to Australia. The normal value of the goods is determined under s. 269TAC of the *Customs Act*. The primary basis for determining normal value is by reference to the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are at arms length transactions by the exporter, or if like goods are not sold by the exporter, by other sellers of like goods. The critical provisions for the purposes of this case are sub-ss. (1) and 2(a) of s. 269TAC (sub-ss. (12) and (13) are also important, but we shall refer to them later when considering a submission which relates to them) which are in the following terms:

"(1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

(2) Subject to this section, where the Minister:

(a) is satisfied that:

- (i) by reason of the absence of sales that would be relevant for the purpose of determining a price under subsection (1); or
- (ii) by reason that the situation in the relevant market is such that sales in that market that would otherwise be relevant for the purpose of determining a price under subsection (1) are not suitable for use in determining such a price;

the normal value of goods exported to Australia cannot be ascertained under subsection (1); or

- (b) is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under subsection (1);

the normal value of the goods for the purposes of this Part is:

- (c) except where paragraph (d) applies, the sum of:
 - (i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and
 - (ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export:
 - (A) such amounts as the Minister determines would be the delivery charges and other costs necessarily incurred in that sale; and

- (B) *subject to subsection (13), an amount calculated in accordance with such rate, if any, as the Minister determines would be the rate of profit on that sale; or*
- (d) *where the Minister so directs, the price determined by the Minister to be representative of the price paid for like goods sold in the ordinary course of trade in the country of export for export to a third country, being sales that are arms length transactions."*

As was observed by the primary Judge, s. 269TAC(1) reflects in part the principles of Article 6 of GATT (Anti-dumping and Countervailing Duties), and states how the dumping of goods on a market may be identified.

Prima facie, the normal value of goods exported to Australia is ascertained by reference to s. 269TAC(1). Sub-section (2) provides for the case where the application of sub-s. (1) will not give a true normal value of the goods. In *Hyster*, Hill J. gave certain examples where this could be so, the two most obvious examples being where there are no sales at all in the country of origin or no arms length sales. His Honour said that the question of the suitability of sales for the purpose of paragraphs (a) and (c) of sub-s. (2) could arise:-

"where there was some factor which so distorts the market that arm's length transactions made in the ordinary course of trade were rendered unsuitable to give the true normal value in the country of export. Incidentally, it may be said that 'suitability' in s. 269TAC(2)(a)(ii) must mean something different from lack of arm's

length sales, that being a matter within s. 269TAC(2)(a)(i)."

His Honour then referred to his earlier judgment in *Enichem*, a judgment in which Gummow and O'Connor JJ. agreed, and to the circumstances referred to by him there where arms length sales might be found to be unsuitable, including the case of the existence of a government monopoly on the trade or the existence of government control of the domestic price.

Before the primary Judge, La Doria's principal submissions were as follows. First it was argued that the Minister had misapplied s. 269TAC of the *Customs Act* in ascertaining the "normal value" of the canned tomatoes exported by La Doria from Italy to Australia and therefore had erred in determining under s. 269TG(1) and (2) of the *Customs Act* that material injury had been caused to an Australian industry. Second, it was argued that the Minister had misconstrued and misapplied the provisions of s. 269TJ of the *Customs Act* in determining that an export subsidy had been granted in respect of the exported goods and that, by reason of that subsidy, material injury had been caused to an Australian industry producing like goods. Third, it was argued that the Minister failed to consider the effect of the imposition of a countervailing duty when deciding to impose a dumping duty, and that such failure involved an error of law.

The primary Judge held, in our opinion correctly, that as the relevant provisions of the *Customs Act* and the *Anti-Dumping*

Act apply to commercial transactions, they must be construed in a common sense fashion, suitable for application to commercial transactions.

It was conceded before his Honour (and on appeal) by counsel for the Minister that there had been no finding of the extent to which the subsidy of the Italian government was reflected in the export price of the canned tomatoes exported by La Doria, a finding that it was necessary to make before any determination could be made by the Minister of the amount of countervailing duty required to offset the benefit of the subsidy applied by the exporter to the export price. The Minister therefore conceded that the directions made by him under ss. 8(5) and 10(5) of the *Anti-Dumping Act* must be set aside. The third order made by his Honour reflected this concession, namely, that the decision and directions of the Minister made on 21 April 1992 pursuant to s. 8(5) and 10(5) of the *Anti-Dumping Act* as to the amount of dumping duty and countervailing duty payable in respect of canned tomatoes exported from Italy to Australia should be set aside. It is agreed by all parties that this order should stand whatever the result of the appeal may be.

His Honour held that, before s. 269TAC(2)(a)(ii) could apply, the conclusion had to be reached that the relevant market was affected by circumstances that created a situation in which the price obtained by La Doria for goods sold in that market could not be regarded as a representative price in that market.

His Honour found that the Authority erred in relying upon the payment of production aid by the Italian Government as the ground for concluding that the price obtained for the sale of like goods in the Italian market was not suitable for use; and that this displayed a misunderstanding of the purpose and consequence of the payment of the production aid. His Honour found the production aid was directed to making the EC manufacturers' products competitive with imports in the domestic market rather than setting an artificial floor for that market. His Honour proceeded to analyse in some detail the relevance of the EEC Commission Regulations 2080/90 and 2037/91 which applied to the 1990/1991 and 1991/1992 marketing years respectively and said that those regulations fixed the minimum price to be paid to producers of processing tomatoes in those years and the amount of production aid to be paid for manufactured tomato products. His Honour said that the regulations did not create a situation in the Italian market for the sale of canned tomatoes which rendered the prices obtained by La Doria for the goods it produced and sold on that market unsuitable for use in determining the price paid for such goods sold in the ordinary course of trade for home consumption in Italy.

His Honour made the following orders and declarations:-

- "1. *The decisions of the second respondent made 13 April 1992 pursuant to s.7 of the Customs Tariff (Anti-Dumping) Act 1975 to recommend that the first respondent make decisions, declarations and directions under sub-ss.269TG(1),*

(2) and 269TJ(1), (2) of the Customs Act 1901 be set aside.

2. The decisions and declarations made by the first respondent on 21 April 1992 pursuant to sub-ss.269TG(1), (2) and sub-ss.269TJ(1), (2) of the Customs Act 1901 that ss.8 and 10 of the Customs Tariff (Anti-Dumping) Act 1975 applied to canned tomatoes and like goods exported from Italy to Australia be set aside.
3. The decision and directions of the first respondent made on 21 April 1992 pursuant to sub-ss.8(5) and 10(5) of the Customs Tariff (Anti-Dumping) Act 1975 as to the amount of dumping duty and countervailing duty payable in respect of canned tomatoes exported from Italy to Australia be set aside.
4. The matter be remitted to the first and second respondents to be determined according to law.
5. The respondents pay the applicant's costs of the application to be taxed."

The reference in order 1 above to the *Customs Tariff (Anti-Dumping) Act 1975* should be to the *Anti-Dumping Authority Act 1988*.

The primary submission made by counsel for the appellants on this appeal was that the Authority correctly found that it was the payment of production aid that had distorted the domestic selling prices in Italy to the extent that canned tomatoes had been consistently sold at prices less than the producers' costs. This finding as to the situation in the Italian market by the Authority was a sufficient basis to invoke s. 269TAC(2)(a)(ii) that the Italian sales were "not suitable for use" within the

meaning of that provision. It was argued that his Honour therefore erred in his finding that it was not permissible to resort to s. 269TAC(2)(a)(ii) because in his Honour's opinion the normal value of the canned tomatoes could be determined by reference to the indicia specified in s. 269TAC(1).

The nub of this case is whether it is correct to say, as the primary judge did, that there was no relevant nexus between the payment of the production aid by the Italian Government and the price paid for canned tomatoes sold in the ordinary course of trade for home consumption in Italy, so that no departure from s. 269TAC(1) was warranted by resort to s. 269TAC(2)(a)(ii).

The Authority was obliged to identify the situation in the relevant market that made sales in that market not suitable for use in determining the normal value as provided for by s. 269TAC(1). The only factor relied upon by the Authority in not applying that sub-section was the payment of production aid. The Authority proceeded upon the basis that the payment of production aid was sufficient to take the determination of normal value out of s. 269TAC(1). It is true, as the primary Judge held, that the giving of the production aid was directed to making the EEC manufacturers' products competitive with imports in the domestic market. It is also true that the production aid applied equally to production for domestic and export sales. Canned tomatoes have been consistently sold by La Doria at prices less than it costs to produce and sell them. Indeed, the percentage loss

without resort to the production aid is substantial. The Italian canners are compensated for the high cost of tomatoes and the losses are recoverable within a reasonable time. Production aid is received by the canners later than sales (local and export sales) are made by them of canned tomatoes. Without the production aid it would be impossible for the canners to sell the canned tomatoes at the prices at which they are sold because the higher price paid by them to the growers for the processing tomatoes reflects their anticipation of the receipt in due course of an amount of money which will convert a trading loss into a profit.

Before s. 269TAC(2)(a)(ii) can be invoked, the decision-maker must be satisfied that there is a situation in the relevant market whereby sales in that market that would otherwise be relevant to determine a price under sub-s. (1) are not suitable for use in determining such a price. Departure from having regard solely to the normal value of the goods as being the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are an arms length transaction by the exporter, would then be justified.

The exercise in which the decision-maker must engage under s. 269TAC(2)(a)(ii) is essentially a practical one. It was for the Authority and later the Minister to determine, as a matter of fact, the true nature and consequence of payments of production aid in the EEC. The Authority went about its task to

determine this question. It determined that the payment of the production aid distorted domestic selling prices to the extent that canned tomatoes were being consistently sold at prices below the production and selling costs of the canners. The Authority therefore considered that sales in Italy were not suitable for use in assessing normal value under s. 269TAC(1) of the *Customs Act* as provided for in s. 269TAC(2)(a)(ii).

In our opinion this approach and the findings of the Authority have not been shown to be erroneous in law. These were matters of fact for the Authority as a decision-maker to determine. The determination of them requires a broad judgment by the Authority on questions of fact: see *McDowell and Partners Pty Limited v Button* (1983) 50 ALR 647 at 660-2; *Hyster* at 592 and *C A Ford Pty Limited v Comptroller-General of Customs* (1991) 25 ALD 275 at 289. See also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

To justify the imposition of dumping duties under s. 269TG of the *Customs Act* and countervailing duties under s. 269TJ there must be a causal link between the material injury to the relevant Australian industry and the dumping of goods; but the establishment of that link is essentially a question of fact for the decision-maker under s. 269TG and s. 269TJ with respect to the existence of the causal link between subsidization and material injury: *ICI Australia Operations Pty Limited v Fraser* (1992) 34 FCR 564 at 572.

In our opinion the Authority was entitled to rely and rely solely on the fact that the payment of production aid had distorted domestic selling prices in Italy to the extent that canned tomatoes had been consistently sold at prices which were less than the production costs of the Italian canners.

The respondent submitted that the approach to the production aid adopted by the Authority for the purposes of s. 269TAC(12) of the *Customs Act* and then for the purposes of s. 269TAC(1) involved a contradiction and a misconstruction of s. 269TAC. The contradiction was said to be between the finding for, the purposes of s. 269TAC(12)(b), that it was likely that the seller would be able to fully recover the losses within a reasonable period of time (so that s. 269TAC(12) did not operate to require the price paid for the product to be treated as not to have been paid in the ordinary course of trade) and the conclusion that the production aid should not be treated as a cost offset.

Subsections (12) and (13) of s. 269TAC are in the following terms:

"(12) Where the Minister is satisfied, in relation to goods exported to Australia, that:

- (a) the price paid for like goods:
 - (i) sold for home consumption in the country of export in sales that are arms length transactions; or
 - (ii) sold in the country of export for export to a third country in sales that are arms length transactions;

is, and has been for an extended period of time and in respect of a substantial quantity of goods, less than the sum of:

- (iii) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and
- (iv) such other amounts as the Minister determines to be the costs necessarily incurred in the sale of the goods by the seller of the goods; and

- (b) it is likely that the seller of the goods referred to in paragraph (a) will not be able to fully recover the amounts referred to in subparagraphs (a)(iii) and (iv) within a reasonable period of time;

the price so paid for the goods referred to in paragraph (a) is to be taken not to have been paid in the ordinary course of trade.

(13) Where, because of the operation of subsection (12), the normal value of goods is required to be determined under subsection (2), the Minister shall not include in his or her calculation of that normal value any profit component under subparagraph (2)(c)(ii)(B)."

The loss to which the Authority referred, when considering whether s. 269TAC(12) operated, was described in the following passages in para 6.1.3 of its report to the Minister:

"The Authority has compared actual costs incurred with prices paid to assess whether sales were made at a profit.

This comparison reveals that costs to make and sell were greater than revenue received; that is, that the canners operate at a loss. However, the production aid received was greater than this loss. The Authority is

therefore satisfied that the losses are recovered within a reasonable time"

The cost of the tomatoes was obviously a component of the loss, but it is important to observe that there were other components as well.

Section 269TAC(2) is, of course, much wider in scope than s. 269TAC(12), as s. 269TAC(13) and s. 269TAC(2)(c)(ii)(B) recognize, so there is no necessary contradiction between circumstances that take a case out of s. 269TAC(12) and those that bring it within s. 269TAC(2). More importantly, in considering whether s. 269TAC(2) applied, the Authority was concerned with the distinct question of the effect of the payment of the production aid on the domestic selling price. It concluded that the production aid had distorted that price and that the sales in Italy were therefore "not suitable for use" within the meaning of s. 269TAC(2). It is perfectly clear that the Authority was never in any doubt that canners were compensated for the high cost of tomatoes and that despite this, and despite the recovery of the losses, it considered that payment of the production aid had distorted the domestic selling price. It was a matter for the Authority to decide whether, for the purposes of determining whether there was a distortion of the domestic selling price and whether the sales in Italy were therefore "not suitable for use", the production aid should not be treated as a cost offset even though it obviously did compensate the canners for the high cost of tomatoes. We see no

necessary contradiction in the Authority's approach to these separate questions and no reason to conclude that the Authority misinterpreted s. 269TAC.

We do not discern error on the part of the Authority or later the Minister in reaching the conclusions which are impugned in this case, except as to the absence of a finding of the extent to which the subsidy was reflected in the export price of canned tomatoes, a matter which goes to the amount of dumping and countervailing duties payable. We respectfully differ from the primary Judge on this essential question in this case.

The primary Judge also found that the report of the Authority to the Minister did not inform the Minister of any consideration which the Authority had given to the requirements of s. 10 of the ADA Act. That section provides so far as material that:

"without limiting the matters to which the Authority had regard in performing its function and exercising its powers, the Authority shall in performing its functions and exercising its powers have regard to:

- (a) the Commonwealth government policy in relation to anti-dumping matters; and*
- (b) Australia's obligations under GATT*

not to use the imposition of duties under the Anti-Dumping Act to assist import competing industries in Australia or to protect industries in Australia from the need to adjust changes in economic conditions."

Chapter 8 of the Authority's report was directed primarily to the question whether material injury had been caused to the Australian industry by dumping and subsidisation as opposed to other factors. Chapter 10 of the report was concerned essentially with the question of ensuring that the amount of duty was not more than was needed to remove the injury to the Australian industry. Indeed Chapter 10 makes explicit reference to s. 10 of the *ADA Act*. The absence of any explicit statement by the Authority that it considered the requirements of s. 10 does not matter. The Authority in fact considered s. 10 and its requirements. Hence we respectfully disagree with his Honour's finding on this question also.

La Doria filed a notice of contention. In support of its notice it argued that the Authority had not addressed the issue of local price levels being set by imports that were not dumped. It was said that there was no consideration of the prices of undumped Thai imports as the prices that could realistically be achieved in the absence of dumping. Similarly, it was said, the relationship between the Thai prices and the Italian prices should have been considered in relation to the question of causation, it being necessary for the Minister to separate quantitatively the material injury resulting from the dumping of goods from detriment caused by other factors.

We are not persuaded that the Authority failed to give proper attention to the effect of undumped Thai goods on the

Australian industry when considering the issues it was required to address.

It is plain that the Authority was well aware that there may be factors other than subsidy or dumping that injure an industry and that such an injury must not be attributed to subsidised or dumped imports.

A perusal of the Authority's report including the section in Chapter 8 headed "Causal Link" shows to our minds that the Authority did consider various factors in addition to the production aid which may have operated to injure the Australian industry. The Authority noted that exports from Spain, Italy and Thailand had received assistance in a variety of forms which in most cases was considerable; that most imports of canned tomatoes from those countries had been dumped with significant dumping margins; and that imports of canned tomatoes from those countries had grown considerably.

The Authority, in considering this causal link compared the prices of canned tomatoes produced by the Australian industry and the prices of imported canned tomatoes; it examined price undercutting in Australia and compared price levels and price undercutting with respect to canned tomatoes that are dumped on the one hand with those that are not dumped on the other. The Authority considered whether it was the dumping of canned tomatoes that was causing some or all of the material injury in

a context that included an examination of undercutting of price by imported canned tomatoes which had not been dumped here.

What the Authority appears to have done as we perceive it is to seek to separate the effect of subsidy on the price in Australia of canned tomatoes and the effect here on price of non-dumped and dumped imported canned tomatoes. The subsidies have particular reference to Thailand because the non-dumped imports from Thailand were to some extent subsidized imports.

What must be borne in mind at all times is that although the task that confronts the Authority and the Minister involves a quantitative assessment, it is essentially a practical exercise.

The conclusion of the Authority that the canned tomatoes exported from Italy had been dumped here and that the causal link between the dumping and the injury to the Australian industry had been established is very much a practical exercise.

As a Full Court of this Court observed in *ICI Australia* at 577-8:

"Although a quantitative assessment is involved, it is essentially a practical exercise and material injury to an industry may be identified even though precise quantification of the injury is not possible. There can be no threshold figure or percentage that is capable of general application; what is material injury will depend upon the circumstances of each case and it will differ from industry to industry and from time to time."

Injury is a matter of degree. As Wilcox J. observed in *C A Ford* at 284:

"The fact that an Australian industry suffers some loss, and therefore some injury to its business, in competing with non-dumped imports does not mean that it fails to suffer a material injury if, by reason of dumping, the loss is increased. In such a case the effect of the dumping is to increase the extent of the injury. If the additional loss is material, that loss is a material injury occasioned by the dumping."

That passage is apt in the present case in relation to the argument under consideration.

The practical exercise to which we have referred must of course be undertaken according to law and it may be invalidated by, for example, a failure to take into account matters that the Authority is bound to take into account or by some material misconception as to the nature of the inquiry that the law requires. But we do not consider that the Authority's approach in this case has been shown to be flawed in the manner contended for by the respondent in its argument in support of its notice of contention. The respondent did not address oral or written argument in support of the other grounds raised in its notice of contention and it is therefore unnecessary for us to deal with them.

In our opinion the following orders should be made:-

1. Order 1 made by Lee J. on 11 June 1993 be set aside;
2. Order 2 made by Lee J. be set aside;
3. Order 3 made by Lee J. be confirmed;
4. Order 4 made by Lee J. be set aside and in lieu thereof it be ordered that the matter be remitted to the first and second respondents for the purpose of determining, pursuant to s. 8(5) and s. 10(5) of the *Customs Tariff (Anti-Dumping) Act 1975*, the amount of dumping duty and countervailing duty payable in respect of canned tomatoes exported from Italy to Australia pursuant to the decisions and directions of the first respondent made on 21 April 1992.
5. Order 5 made by Lee J. be set aside and in lieu thereof it be ordered that La Doria pay three-quarters of the costs of the appellants of the proceedings at first instance and that La Doria pay the costs of the appellants of this appeal.

The reason for the order for costs being as indicated by us is because at the commencement of the hearing at first instance the concession was made by the appellants that the relevant decisions and directions would have to be set aside for the

reason mentioned earlier in my reasons, namely, to determine the correct amount of dumping duty and countervailing duty payable in respect of canned tomatoes exported from Italy to Australia.

I certify that this and the preceding thirty-three (33) pages are a true copy of the reasons for judgment herein of the Honourable Chief Justice Black and the Honourable Mr. Justice Lockhart.

Associate *Elisabeth Peden*

Dated: 10 February 1994

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) NG 428 of 1993
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE
FEDERAL COURT OF AUSTRALIA

MINISTER FOR SMALL BUSINESS,
CONSTRUCTION & CUSTOMS
First Appellant

ANTI-DUMPING AUTHORITY
Second Appellant

COMPTROLLER-GENERAL OF
CUSTOMS
Third Appellant

LA DORIA DI DIODATA
FERRAIOLLI S.P.A.
Respondent

Coram: Black C.J., Lockhart and Whitlam JJ
Place: Sydney
Date: 10 February 1994

REASONS FOR JUDGMENT

WHITLAM J.

The background to this appeal and the relevant statutory provisions are set out in the judgment of Black CJ and Lockhart J. However, as I have reached a different view about the Authority's assessment of the normal value of canned tomatoes exported to Australia by La Doria, I wish to add briefly to the description of the evidence on that subject.

As part of the initial investigation, Customs' officers visited La Doria's premises in Italy on 23 October 1991. The

results of their investigation are recorded in Brussels Office Report ("BOR") No. 91/36. They concluded that normal values should be based on La Doria's domestic selling prices. This recommendation was accepted and, in its preliminary finding report, Customs established normal values for canned tomatoes exported from Italy under s 269TAC(1) of the Customs Act, adjusted where appropriate under s 269TAC(8).

Customs officers again visited La Doria's premises on 21 and 25 February 1992, this time on behalf of the Authority. The information obtained is contained in BOR No. 92/5 dated 22 March 1992 by Ms Fisher, Australian Customs Representative, Brussels. In that report verification of domestic selling prices was considered in Section 6, and in Section 6.4 Ms Fisher said:

"Section 7.1 below shows a comparison of net selling price with cost to make and sell (CTMS). In terms of s 269TAC(12) the net selling price covers the determined cost to make and sell. It should be noted that this comparison includes the net cost of the tomatoes. La Doria's internal management records treats it (sic) costings in this manner ie it nets out the production aid in assessing its CTMS and I have no reason to find this unacceptable."

Ms Fisher dealt with cost of production in Section 7 of her report. She had been furnished with details of La Doria's actual cost of production and of production aid received by it for 1991. In Section 7.1 she summarized in tabular form La Doria's cost to make and sell each size of can, after deducting from the variable costs of the raw materials an amount per can in respect of production aid. Ms Fisher reported that La Doria claimed it paid

for its tomatoes in early October 1991, and she was provided with copies of its claim for payment of production aid dated 18 October 1991 and of a payment advice dated 23 November 1991. She concluded that "La Doria's domestic sales are considered suitable to assess a normal value under s269TAC(1) of the Customs Act."

Two other Italian manufactures of canned tomatoes were visited on behalf of the Authority: Lodato Genaro & C S.p.A. ("Lodato") on 20 and 21 February 1992 and, Conserve Alimentari Fiamma Vesuviana srl ("Fiamma") on 24 February 1992. They are the subject respectively of BOR No. 92/7 dated 31 March 1992 and BOR 92/6 dated 25 March 1992.

Mr Peter Evans was the Authority's Project Manager responsible for the day-to-day management of its inquiry. In his affidavit Mr Evans says that, in drafting the Authority's report, he had regard to these four reports from Brussels and that:

"10. I had regard to the evidence that the companies received payments of a production subsidy. I noted that the payment of this subsidy was recorded as a separate item in the profit and loss accounts of the companies. I also noted that Fiamma recorded these payments as a revenue item."

The Authority forwarded its report to the Minister on 13 April 1992. In Section 6.3.1 dealing with the assessment of normal values for Italy, the Authority summarized its inquiry as follows:

"Customs identified 62 exporters of canned tomatoes from Italy. Customs invited all exporters to lodge submissions and contacted a

number of companies in Italy to obtain information. However, only one company made a submission to Customs and only one other company agreed to assist the inquiry. Customs visited both of these companies in Italy. Information which could be used to establish normal values was only provided by one company, La Doria ...

Customs assessed normal values for La Doria and other Italian exporters under subsection 269TAC(1) of the Customs Act using information on sales by La Doria in Italy which was verified by Customs representatives.

Following Customs' preliminary finding the relevant Italian Industrial Association (Associazione Nazionale Industriale Conserve Alimentari Vegetali) sought to provide further information to facilitate the assessment of normal values.

Subsequently Customs officers, acting on behalf of the Authority, visited three Italian manufacturers of canned tomatoes - La Doria, ... Fiamma and ... Lodato for the purpose of collecting and verifying information suitable for establishing normal values. This included verification of actual prices paid and costs to make and sell.

La Doria is a large company supplying a range of "La Doria" and other branded processed fruit products to the Italian and other markets. Its exports to Australia are a minor proportion of its operations and also of total Australian imports of canned tomatoes.

Fiamma exports canned tomatoes to a number of customers in Australia.

Lodato is a family owned and managed company which produces a range of products under the brand "Annalisa".

So far as the reports from Brussels are concerned, this summary is unexceptionable. It may be noted that the two pieces of information particularly mentioned as being sought "for establishing normal values" were "actual prices paid and costs to make and sell." The report then goes on to set out the Authority's findings and conclusions:

- (1) "The assessment of normal values in Italy is complicated by the existence of subsidies.
- (2) Italian manufacturers claimed that the production aid received should be treated as a cost offset and thus used to reduce the total cost to make and sell canned tomatoes.
- (3) The Authority acknowledges that canners are compensated for the high cost of tomatoes. However, the fact remains that the costs of purchasing tomatoes locally is reflected in the company accounts as a cost item.
- (4) The Authority notes that the production aid is received as a separate revenue item well after the company incurs its manufacturing costs. It therefore does not accept that the production aid paid should be treated as a cost offset.
- (5) The Authority has compared actual costs incurred with prices paid to assess whether sales were made at a profit.
- (6) This comparison reveals that costs to make and sell were greater than revenue received: that is, that the canners operate at a loss. However, the production aid received was greater than this loss. The Authority is therefore satisfied that the losses are recovered within a reasonable time and that subsection 269TAC(12) cannot be used to assert that sales are not in the ordinary course of trade.
- (7) The payment of the production aid has, however, distorted domestic selling prices to the extent that canned tomatoes are being consistently sold at prices less than the companies' costs to make and sell the goods. The Authority therefore considers that sales in Italy are "not suitable for use" in assessing normal values under subsection 269TAC(1) of the Customs Act, as provided for in subparagraph 269TAC(2)(a)(ii) of the Act."

(I have added the numbers in parentheses for ease of discussion in what follows.)

The first thing that strikes me about the above passage is the curious description of the contents of the company accounts

referred to in paragraph (3). These are, of course, the profit and loss accounts mentioned in the affidavit of Mr Evans. It would, no doubt, be a matter for the greatest suspicion if payments of production aid were not "recorded" in those accounts. So too, I fail to see why the Authority regards it as a "fact" worth mentioning in paragraph (3) that the cost of purchasing tomatoes is reflected in those accounts as a cost item. The statement in the first sentence of paragraph (4) is wrong. As Mr Evans correctly said in his affidavit, only Fiamma recorded the production aid payments as a revenue item. La Doria deducted such payments in calculating its net cost of raw materials. Ms Fisher's report makes that clear. This seems to remove the basis for the Authority's conclusion in the second sentence of paragraph (4). (It may also be doubted whether, in the case of La Doria, it would be true to say that production aid paid on 23 November 1991 is received "well after" costs incurred in early October 1991. I should have thought most creditors would be delighted to be paid so promptly.)

However, La Doria's case does not turn on the Authority's misreading of the Italian companies' accounts. La Doria submits that, in the succeeding paragraphs (5), (6), and (7) of the passage set out, the Authority approaches the determination of "costs to make and sell" in a way that is contradictory and misconstrues s 269TAC of the Customs Act.

The comparison mentioned in paragraphs (5) and (6) requires the Authority to determine the amounts referred to in s 269TAC

(12)(a)(iii) and (iv). These amounts may collectively be conveniently described as the cost to make and sell. (This is the expression used by the Minister in his direction under s 12 of the ADA Act.) The Authority uses two infelicitous expressions in paragraph (6). First, it refers to "revenue received" when it means "price paid" - see s 269TAC(12)(a), thereby using "revenue" in a different sense to the way in which it uses the term in paragraph (4). Second, the Authority says it is satisfied that "the losses are recovered within a reasonable time", whereas what s 269TAC(12)(b) requires is a likelihood of full recovery within a reasonable period of time of the cost to make and sell. The word "losses" is not mentioned in s 269TAC(12)(b). Of course, any "losses" will be recovered if the cost to make and sell is recovered but, in my view, it should be borne in mind that it is the prospect of the recovery of the cost to make and sell that must be assessed.

It will be apparent that Ms Fisher and the Authority determined La Doria's cost to make and sell differently. Ms Fisher deducted the production aid from the cost of the raw materials. This meant that she did not find that sales were made at a loss and, accordingly, she did not need to consider s 269TAC(12)(b). On the other hand, the Authority declined to deduct the production aid in determining the cost to make and sell, and concluded that the sales were made at a loss. Parliament provided for these circumstances in s 269TAC(12)(a), and the consequence will be that such sales are to be taken not to have been made "in

the ordinary course of trade", unless s 269TAC(12)(b) applies. However, the Authority was satisfied that provision did apply.

The Authority then went on to make the finding in the first sentence of paragraph (7) of its reasons. The phrase "to the extent" seems designed to introduce a clause giving the reason for the "distorted domestic selling prices", rather than one quantifying the distortion. Otherwise there is the bald finding that such prices were distorted. This means, in effect, that the relevant finding is that the goods "are being consistently sold at prices less than the companies' costs to make and sell the goods." As I have said, this is the very situation that the Act deals with in s 269TAC(12)(a). The word "consistently" merely paraphrases the requirement that such sales be made over an extended period of time in substantial quantities.

Unless s 269TAC(12)(b) applies, the Act deems such sales not to have been made "in the ordinary course of trade." This would bring s 269TAC(2)(a)(i) into play - see Hyster Australia Pty Ltd v. Anti-Dumping Authority (1993) 40 FCR 364 at 370 and 373. But the Authority has chosen to label such sales as "not suitable for use" within the meaning of s 269TAC(2)(a)(ii).

It is at this point that I respectfully differ from the view of Black CJ and Lockhart J. I accept that circumstances may take a case out of s 269TAC(12), yet bring it within s 269TAC(2)(a). However, I am unable to discern that the Authority was concerned with "the distinct question" of the effect of the payment of

production aid on the domestic selling price. It seems to me that this is the question that the Authority had to consider in the context of s 269TAC(12)(b) for the purpose of deciding the likelihood of a full recovery of the cost to make and sell so as to take the case out of s 269TAC(12). The payment of the production aid was relevant to the recovery of the cost to make and sell. Accordingly, mere mention of such payment by the Authority cannot, by itself, discharge its obligation to identify "the situation in the relevant market" under s 269TAC(2)(a)(ii) that renders the sales "not suitable for use". Some explanation of the reason for such a conclusion is required.

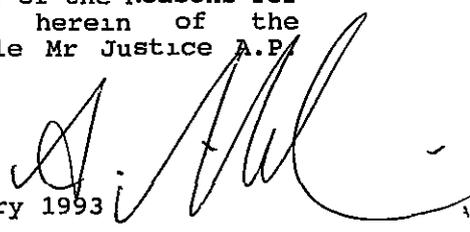
In my opinion, Lee J correctly held that the Authority misconstrued its task under s269TAC(2)(a)(ii) and failed to identify "the situation in the relevant market". Since the Minister agreed with the Authority's recommendation, he erred in his determination of the normal value of canned tomatoes exported to Australia by La Doria. Such determination taints the declarations by the Minister under s 269TG(1) and (2) of the Customs Act. The appeal against that part of the orders of Lee J should be dismissed.

However, for the reasons given by Black CJ and Lockhart J, with which I respectfully agree, the orders made by Lee J should be set aside so far as they affect the recommendations and declarations under s 269TJ(1) and (2) of the Customs Act.

The order for costs made by Lee J should be confirmed, and each party should pay its own costs of the appeal.

I certify that this and the preceding nine pages are a true copy of the Reasons for Judgment herein of the Honourable Mr Justice A.P. Whitlam.

Associate:
Date: 10 February 1993

A handwritten signature in black ink, appearing to be 'A.P. Whitlam', written over the printed name in the text block above.

Counsel for the Appellants : Mr B Walker
Mr S Gageler

Solicitors for the Appellants : Australian Government
Solicitor

Counsel for the Respondent : Mr A Robertson

Solicitors for the Respondent : Baker & McKenzie

Date of Hearing : 18 August 1993

Date of Judgment : 10 February 1994