

FEDERAL COURT OF AUSTRALIA

← **LA DORIA** → DI DIODATA FERRAIOLI S.P.A. v. DAVID PETER BEDDALL,
MINISTER FOR
SMALL BUSINESS, CONSTRUCTION AND CUSTOMS; ANTI-DUMPING
AUTHORITY and
COMPTROLLER-GENERAL OF CUSTOMS
No. NG541 of 1992
FED No. 391
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Administrative Law

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Lee J(1)

CATCHWORDS

Administrative Law - Customs - anti-dumping - determination of "normal value" of imports - whether material injury to Australian industry causally related to dumped goods or goods favoured by export subsidies.

[Administrative Decisions \(Judicial Review\) Act 1977](#)

[Anti-Dumping Authority Act 1988 ss.7, 10, 11](#)

[Customs Act 1901](#) ss.10, [269TAC](#), [269TAE](#), [269TG](#), [269TJ](#); sub-ss.269TAC(1), (2), 269TAE(1), (3), 269TG(1), (2), 269TJ(1), (2); paras.269TAC(2)(a), (c), 269TAE(1)(g), 269TD(2)(b); sub-para.269TAC(2)(a)(ii)

[Customs Tariff \(Anti-Dumping\) Act 1975 ss.8, 10](#); sub-ss.8(5) and 10(5); para.7(1)(d)

[Judiciary Act 1903 s.39B](#)

C.A. Ford Pty. Ltd. trading as Caford Castors v. Comptroller-General of Customs [\(1992\) 25 ALD 275](#)

Castle Bacon Pty. Ltd. v. The Anti-Dumping Authority, Unreported (Federal Court of Australia, Gummow J, 9 November 1992)

Enichem Anic Srl v. Anti-Dumping Authority [\[1992\] FCA 579](#); [\(1992\) 111 ALR 178](#)

ICI Australia Operations Pty. Ltd. v. Fraser [\[1992\] FCA 120](#); [\(1992\) 106 ALR 257](#)

Irish Country Bacon (Cooked Meats) Limited v. Comptroller-General of Customs [\[1991\] FCA 538](#); [\(1991\) 32 FCR 355](#)

Hyster Australia Pty. Ltd. v. Anti-Dumping Authority ([1993](#)) [112 ALR 582](#)

Marine Power Australia Pty. Ltd. v. Comptroller-General of Customs ([1989](#)) [89 ALR 561](#)

Minister for Aboriginal Affairs v. Peko-Wallsend Limited [[1986](#)] [HCA 40](#); ([1986](#)) [162 CLR 24](#)

Swan Portland Cement Ltd. v. Minister for Science, Customs and Small Business ([1989](#)) [88 ALR 196](#)

Tasman Timber Ltd. v. Minister for Industry and Commerce [[1983](#)] [FCA 20](#); ([1983](#)) [67 FLR 12](#)

HEARING

SYDNEY, 19-20 November 1992

11:6:1993, MELBOURNE

Counsel for the Applicant: A. Robertson

Solicitors for the Applicant: Baker and McKenzie

Counsel for the First,
Second and Third Respondents: S.J. Gageler

Solicitors for the First,
Second and Third Respondents: Australian Government Solicitor

ORDER

THE COURT ORDERS AND DECLARES THAT:

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.

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

DECISION

LEE J The applicant ("**La Doria**") is a company incorporated in Italy. It carries on business as a processor of fruit products and the principal sales of those products are to the Italian and European markets. For approximately twenty years **La Doria** has exported canned tomatoes from Italy to Australia. At all material times those exports have represented a minor proportion of Australian imports of that product.

2. In July 1991 an application was lodged by the "Canned Foods Information Service" with the Department ("Customs") administered by the first respondent ("the Minister") seeking the imposition of anti-dumping and countervailing action under the [Customs Tariff \(Anti-Dumping\) Act 1975](#) ("the Anti-Dumping Act") against canned tomatoes that had been, or were likely to be, exported to Australia from Italy, Spain, Thailand and China. The application was lodged on behalf of Australian manufacturers of canned tomatoes.

3. Customs accepted the application, conducted an inquiry and in December 1991 made a preliminary finding that there were sufficient grounds to publish dumping and countervailing duty notices and referred that preliminary finding to the second respondent ("the Authority") pursuant to para.269TD(2)(b) of the [Customs Act 1901](#) ("the [Customs Act](#)").

4. Pursuant to [s.7](#) of the [Anti-Dumping Authority Act 1988](#) ("the [ADA Act](#)") the Authority was required to hold an inquiry into the matter referred to it by Customs and report to the Minister -

- a) recommending whether a dumping and/or countervailing duty notice should be published and the extent of the duty to be levied under the Anti-Dumping Act;
- b) 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;
- c) setting out the reasons for the recommendations.

5. Pursuant to [s.10](#) of the [ADA Act](#) the Authority, in performing its functions under [s.7](#) of the [ADA Act](#), was obliged to have regard to

- (a) the Commonwealth Government's policy in relation to anti-dumping matters; and
- (b) Australia's obligation under the General Agreement on Tariffs and Trade ("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 to changing economic conditions.

6. Pursuant to [s.11](#) of the [ADA Act](#) the Authority, in making a recommendation under [s.7](#) of the [ADA Act](#), was instructed to determine any matter ordinarily required to be determined by the Minister in a like manner as if the Authority was the Minister and to have regard to the

same considerations to which the Minister would be required to have regard if the Minister were determining the matter.

7. The Authority conducted an inquiry, reviewed the findings of Customs and presented a report to the Minister in April 1992 ("the Report"). The Report recommended that anti-dumping and countervailing action be taken under the Anti-Dumping Act. In April 1992 the Minister imposed a countervailing duty upon canned tomatoes exported to Australia from Italy, Spain and Thailand, an "anti-dumping duty" on canned tomatoes exported to Australia from Italy and a "dumping duty" on canned tomatoes exported to Australia from China.

8. **La Doria** contends that the decisions of the Minister to impose countervailing and dumping duties on canned tomatoes exported from Italy to Australia involved errors of law and seeks orders setting aside the decisions and restraining the Comptroller-General of Customs from collecting the duties imposed.

9. The application was brought pursuant to the jurisdiction conferred on the Court by the [Administrative Decisions \(Judicial Review\) Act 1977](#) and [s.39B](#) of the [Judiciary Act 1903](#).

10. **La Doria**'s principal submissions were as follows. First, it was said that the Minister had misapplied the provisions of [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 sub-ss.269TG(1) and (2) of the [Customs Act](#) that material injury had been caused to an Australian industry. Second, it was submitted 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 said 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.

11. The relevant facts set out in the Report were as follows.

12. Seven manufacturers in Australia produce canned tomatoes from locally grown tomatoes. Three of those manufacturers gain 90% of the sales of the Australian made product. Apparently no Australian manufacturer exports its product. 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 returns to processors from sales of products other than canned tomatoes. Only 20% of processing tomatoes are produced as canned tomatoes.

13. The estimated weight of canned tomatoes sold in the Australian market in 1991 was 37,000 tonnes. Until 1989 Australian manufacturers supplied almost 3/4 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 the imported fruit as Australian goods. The shortfall also stimulated an increase in the imports of canned tomatoes. In 1989 the weight of canned tomatoes sold in the Australian market increased by 50 per cent. The Australian market contracted in 1990 but in 1991 it was still 40 per cent greater than the market of 1988.

14. In 1991 the Australian producers of canned tomatoes claimed that material injury had been caused or was threatened to the Australian industry by the sale in Australia of canned tomatoes exported from Spain, Thailand, China and Italy as dumped and subsidised goods and sought the imposition of anti-dumping and countervailing measures against the imported goods.

15. In the Report the Authority noted that despite growth in the Australian market between 1988 and 1991, in 1991 "sales by Australian producers fell, prices declined, profits and profitability were sharply lower and prices paid to growers fell" and for those reasons the Authority was satisfied that the Australian industry had suffered material injury. The Authority recommended 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."

16. As has been stated earlier the Minister accepted the recommendations and made appropriate declarations and directions for the imposition of duties under the Anti-Dumping Act.

17. A description of the framework and of the development of anti-dumping legislation and its relationship to the international obligations undertaken by Australia under GATT is set out in *Tasman Timber Ltd. v. Minister for Industry and Commerce* [1983] FCA 20; (1983) 67 FLR 12; *Marine Power Australia Pty. Ltd. v. Comptroller-General of Customs* (1989) 89 ALR 561 at pp 562-565; *Swan Portland Cement Ltd. v. Minister for Science, Customs and Small Business* (1989) 88 ALR 196 at pp 198-199; *ICI Australia Operations Pty. Ltd. v. Fraser* [1992] FCA 120; (1992) 106 ALR 257 at pp 258-263; *Enichem Anic Srl v. Anti-Dumping Authority* [1992] FCA 579; (1992) 111 ALR 178 at pp 181-183; *Irish Country Bacon (Cooked Meats) Limited v. Comptroller-General of Customs* [1991] FCA 538; (1991) 32 FCR 355 at pp 360-367) and it is unnecessary to repeat that detail in these reasons.

18. The starting point for consideration of a complaint of dumping is [s.269TAC](#) of the [Customs Act](#). The relevant parts of [s.269](#) TAC in this matter are as follows:

"269TAC(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.

269TAC(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."

19. Sub-section 269TAC(1) reflects in part the principles of Article 6 of GATT (Anti-dumping and Countervailing Duties), and sets out how the dumping of goods on a market may be identified. A product is considered to be dumped if its export price is lower than its normal value, the prime measure of which is the domestic price in the country of export. If the domestic price as obtained by the exporter is representative of the market price in that country, it is the price against which the export price is to be compared. If that price is not representative of the market in which it is obtained or other factors were operating in the market to make the representative price unusual and, therefore, unsuitable, it may be disregarded and a notional normal value for the exported goods established by use of the provisions of para.269TAC(2)(c). That situation may arise, for example, if the price at which the exporters' goods are sold on the domestic market at the time of export is influenced by seasonal factors, the dumping of imported goods or the lack of trading in the goods in that market to set a true market price.

20. In the preliminary finding referred to the Authority for further enquiry, Customs applied the terms of sub-s.269TAC(1) and determined that the normal value of like goods sold by **La Doria** in Italy was the price it obtained for the goods in the Italian market. **La Doria** sold its product in Italy to a substantial number of customers, principally wholesalers.

21. In conducting its enquiry the Authority reached a different conclusion on the normal value of the goods. The Authority noted that **La Doria**, as the producer of products processed from fruit supplied by growers within the European Economic Community ("the Community"), was the recipient of a "production aid" set by the Commission of the European Communities ("the Commission"). The Authority had regard to Commission Regulation (EEC) No. 2080/90 and No. 2037/91 which set the amount of production aid payable to, inter alia, Italian producers of canned tomatoes. The Authority stated that having examined the Commission Regulations it 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 countervailable subsidy within the meaning of [s.269TJ](#) of the [Customs Act](#). It also determined that 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 concluded that the production aid should not be treated as a "cost offset". The Authority was satisfied that sales of like goods in Italy by **La Doria** were in the ordinary course of trade but 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 a 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.

22. As a result the Authority considered that sales in Italy were not suitable for use in assessing normal values under sub-s.269TAC(1) of the [Customs Act](#), and was satisfied that sub-para.269TAC(2)(a)(ii) should be applied. The Minister apparently adopted the reasoning of the Authority in satisfying himself that sub-s.269TAC(1) did not apply and that sub-para.269TAC(2)(a)(ii) was the relevant provision to establish the normal value. The Authority assessed the normal value of goods exported by ← **La Doria** → pursuant to para.269TAC(2)(c) and the Minister adopted that assessment as his determination of the normal value.

23. The Authority did not identify the situation in the relevant market that made sales in that market not suitable for use in determining the price paid for those goods in the ordinary course of trade for home consumption in Italy. The Authority's reasoning appeared to be succinctly expressed in the following statement:

"The payment of the production aid has, however, distorted domestic selling prices to the extent that canned tomatoes have been 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 sub-section 269TAC(1) of the [Customs Act](#) as provided for in sub-paragraph 269TAC(2)(a)(ii) of the Act."

24. There is nothing in the material referred to by the Authority to suggest that the price at which ← **La Doria** → sold like goods in the domestic market was out of line with the price at which those goods were sold by other suppliers of like goods to that market, or that the prices prevailing in the market were so affected by other influences that they did not represent the usual market price for those goods in Italy.

25. The Authority's reliance upon the payment of the production aid as the ground for concluding that the price obtained for the sale of like goods in the Italian market was not suitable for use as the normal value of the exported goods displays a misunderstanding of the purpose and the consequence of the payment of the production aid. The Commission Regulations which provided for the payment of a production aid had combined or interlocking purposes of which the payment of a production aid was only part.

26. Commission Regulations 2080/90 and 2037/91, which applied to the 1990/91 and 1991/92 marketing years respectively, 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. The recitals to each Regulation were similar although not identical, and showed that the Commission had regard to the treaty establishing the Community and to the formation of a common organization of the market in products processed from fruit established by earlier regulations. Other pertinent recitals to Regulation 2080/90 were as follows:

"Whereas, under Article 4(1) of Regulation (EEC) No 426/86, the minimum price to be paid to producers is to be determined on, firstly, the basis of the minimum price applying during the previous marketing year, secondly, the movement of basic prices in the fruit and vegetable sector, and thirdly, the need to ensure the normal marketing of fresh products for the various uses, including supply of the processing industry; Whereas Article 5 of Regulation (EEC) No 426/86 lays down the criteria for fixing the amount of production aid; whereas account must, in particular, be taken of the aid fixed for the previous marketing year adjusted to take account of changes in the minimum price to be paid to producers and the difference between the cost of the raw material in the Community and in the major competing third countries; whereas, in respect of tomato concentrates, preserved whole peeled and unpeeled tomatoes and tomato juices, trends in the volume and prices of imports must be taken into consideration; Whereas Article 1(1) of Council Regulation (EEC) No 989/84, as last amended by Regulation (EEC) No 1204/90, fixed as the guarantee threshold for each year a quantity of processed tomato products corresponding to 5 567 050 tonnes of fresh tomatoes for the 1990/91 marketing year; whereas Community production calculated in accordance with Article 2(2) of that Regulation does not exceed the threshold for the 1989/90 marketing year and the production of each group of tomato-based products is not higher than the quantity specified in the second subparagraph of Article 1(1) of the same Regulation;"

27. The Regulation then provided for a minimum price to be paid to growers of tomatoes and a production aid to be paid for products obtained from tomatoes grown in Member States of the Community. The minimum price did not apply to all tomatoes purchased by the manufacturers and similarly the production aid was not payable in respect of all products manufactured by the canners. Quotas applied to the Member States for the tomatoes which would qualify for the payment of the minimum price and quotas were allocated to the manufacturers of processed tomatoes in each Member State for the goods on which a production aid would be paid.

28. It was apparent that the Commission Regulations were designed to ensure a market for 5.5m tonnes of processing tomatoes (6.5m tonnes in 1991/92) produced by growers in Member States at a price that provided a better return to growers than otherwise available on the market and to have those tomatoes processed as tomato products by a manufacturer in a Member State. The fixed minimum price insulated growers from market forces but, according to the recitals, the production aid was intended to restore the tomato products of a community

manufacturer to a market competitive position if the goods were manufactured from tomatoes produced in the Community. In setting the production aid the Commission had regard to the difference between the cost of tomatoes in the Community, which included tomatoes for which a minimum price had been fixed, and the cost of tomatoes in major competing third countries and by having regard to trends in the volume of canned tomatoes imported and the prices of those imports in the Community market. The setting of the production aid was directed to making Community manufacturers' products competitive with imports in the domestic market rather than setting an artificial floor for that market.

29. Although the Regulations may have been designed to protect tomato growers in the Member States and, derivatively, manufacturers of tomato products in Member States, it did not follow that the Regulations created a situation in the Italian market for the sale of canned tomatoes that rendered the prices obtained by  **La Doria**  for the goods it produced and sold on that market not suitable for use in determining the price paid for such goods sold in the ordinary course of trade for home consumption in Italy.

30. Paragraph 269TAC(2)(a) required the market in Italy to be analysed before it was concluded that the market was affected by circumstances that created a situation in which the price obtained by  **La Doria**  for the goods it sold in that market could not be regarded as a representative price in the market able to be relied upon as the normal value of the goods.

31. The Authority misunderstood the operation of para.269TAC(2)(a) and did not carry out the analysis required by sub-para.269TAC(2)(a)(ii) before the conclusion was reached that the normal value of the imported goods could not be ascertained under sub-s.269TAC(1). It was not a case of the Authority reaching a conclusion of fact after following appropriate statutory procedures. The procedures were not followed and, therefore, no relevant conclusion was formed to permit para.269TAC(2)(c) to be applied instead of sub-s.269TAC(1). (See *Enichem* at pp 189-190.)

32. That is not to say there was a duty on the Authority to undertake an investigation for the purpose of para.269TAC(2)(a) but having purported to apply the provisions of sub-para.269TAC(2)(a)(ii), the Authority was obliged to comply with the terms of the [Customs Act](#) and identify the situation in the relevant market that made sales in that market not suitable for use in determining the normal value as provided in sub-s.269TAC(1).

33. Whether the domestic market in Italy is a market in the sense of a free trading market is not the question required to be addressed under sub-para.269TAC(2)(a)(ii). Depressing or inflating factors affecting the price of goods sold in that market will not in themselves establish that there is a situation in the market that makes prices obtained in the market unsuitable for use for the purpose of sub-s.269TAC(1). (See *Hyster Australia Pty. Ltd. v. Anti-Dumping Authority* ([1993](#)) [112 ALR 582](#) per Hill J at pp 587-592; *C.A Ford Pty. Ltd. trading as Caford Castors v. Comptroller-General of Customs* ([1992](#)) [25 ALD 275.](#))

34.  **La Doria**  further submitted that the Minister, by reliance upon the reasoning and recommendations of the Authority, had erred in making a declaration under [s.269TJ](#) of the [Customs Act](#) that s.10 of the Anti-Dumping Act applied to canned tomatoes that had been exported to Australia from Italy, or to like goods exported to Australia after the date of the declaration.

35. The relevant parts of s.269TJ are as follows:

"269TJ(1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia, that:

(a) in the country of origin or the country of export of the goods, there has been paid or granted, directly or indirectly, upon the production, manufacture, carriage or export of those goods a subsidy, bounty, reduction or remission of freight or other financial assistance; and

(b) because of that:

(i) material injury to an Australian industry producing like goods has been or is being caused or is threatened or the establishment of an Australian industry producing like goods has been or may be materially hindered; or

(ii) in a case where security has been taken under section 42 in respect of any interim duty that may become payable on the goods under section 10 of the Anti-Dumping Act - material injury to an Australian industry producing like goods would or might have been caused if the security had not been taken;

the Minister may, by notice published in the Gazette, declare that section 10 of that Act applies to those goods.

269TJ(2) Where the Minister is satisfied, as to goods of any kind that:

(a) there has been paid or granted, directly or indirectly upon the production, manufacture, carriage or export of like goods that have already been exported to Australia, and there may be paid or granted,

directly or indirectly, upon the production, manufacture, carriage or export of like goods that may be exported to Australia in the future, a subsidy, bounty, reduction or remission of freight or other financial assistance; and

(b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is being threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered;

the Minister may, by notice published in the Gazette (whether or not he or she has made, or proposes to make, a declaration under subsection (1) in respect of like goods that have been exported to Australia), declare that section 10 of the Anti-Dumping Act applies to like goods:

(c) that are exported to Australia after the date of publication of the notice or such later date as is specified in the notice; and

(d) on the production, manufacture, carriage or export of which a subsidy, bounty, reduction or remission of freight or other financial assistance is paid or granted."

36. In its Report to the Minister the Authority stated that it had considered Commission Regulation (EEC) No. 2989/90 which fixed the export refunds to be paid to manufacturers in the Community of products processed from fruit harvested in the Community and was satisfied that canned tomatoes of one kilogram or more exported to Australia from Italy qualified for the payment or grant of a subsidy pursuant to the Commission Regulation, a circumstance to which [s.269TJ](#) of the [Customs Act](#) applied. The Authority noted in the Report that Italian manufacturers of the canned tomatoes exported to Australia had submitted claims for the subsidy but, for administrative or other reasons, the subsidy had not been paid in respect of the goods exported. The Authority also noted that the exporters informed the Authority that the subsidy had not been taken into account in setting export prices for the canned tomatoes exported to Australia. The Authority was satisfied that there was no suggestion that the subsidy would not be paid in due course and concluded that the discretion provided for in [s.269TJ](#) of the Act was available to the Minister by reason of those circumstances.

37. **La Doria** submitted that on those facts the Authority could not conclude that there had been "paid or granted" a subsidy within the meaning of sub-ss.269TJ(1) or (2) of the [Customs Act](#).

38. The Commission Regulation was binding on all Member States of the Community and, apparently, was not subject to any limit in the amount to be distributed to the manufacturers in any Member State. Qualification for the export refund fixed by the regulation depended upon the exported product of canned tomatoes being in packages of a net content equal to or greater than one kilogram obtained from fruit harvested within the Community.

39. There was nothing in the material before the Authority to suggest that canned tomatoes of one kilogram or more, exported by Italian manufacturers, did not qualify upon export for payment of the export refund. **La Doria** submitted that for s.269TJ of the [Customs Act](#) to apply to those circumstances something more definite than the lodgment of a claim would be required before it could be said that an export subsidy had been paid or granted.

40. The relevant provisions of the [Customs Act](#) and the Anti-Dumping Act are to apply to, and be understood by participants in, commercial transactions and the construction of those provisions will involve the application of a commonsense meaning to the words used suitable for the governance of commercial activities. The Commission Regulation describes a binding entitlement to the payment of an export refund upon demonstration of the occurrence of the qualifying circumstances. No element of discretion is involved in the payment of the subsidy. Approval of a claim for payment of the subsidy under the regulation would not be a grant of the subsidy for the purpose of s.269TJ. The grant of the subsidy is embodied in the fixing of the entitlement by the Commission Regulation. The Authority did not err in its conclusion that the export subsidy had been granted to the Italian exporters of cans of tomatoes of one kilogram or more. It was not submitted that the Authority had failed to make the recommendation required by para.7(1)(d) of the Anti-Dumping Act as to whether the Minister ought to be satisfied as to the matters in respect of which the Minister was required to be satisfied under sub-s.269TJ(2) of the [Customs Act](#) thereby invalidating the notice issued thereunder by the Minister. (See Hyster pp 594-597.)

41. It was further submitted by **La Doria**, however, that the Authority, and, therefore, the Minister, had failed to find to what extent the export subsidy was reflected in the export price of the canned tomatoes exported by **La Doria**. Counsel for the Minister conceded that there had been no finding of the degree to which the subsidy was incorporated in the export price, being a finding necessary for any determination of the amount of countervailing duty necessary to offset the benefit of the subsidy applied by the exporter to the export price. (See *Castle Bacon Pty. Ltd. v. The Anti-Dumping Authority*, Unreported (Federal Court of Australia, Gummow J, 9 November 1992, pp 16-19).) It was conceded, therefore, that the directions made by the Minister under sub-ss.8(5) and 10(5) of the Anti-Dumping Act must be set aside.

42. **La Doria** also submitted that the Minister erred in concluding that material injury had been caused, or was likely to be caused, to the Australian industry of tomato canning by adopting the incorrect approach applied by the Authority to assess that issue in making its recommendation to the Minister.

43. **La Doria** contended that the Minister could not be satisfied, as required by [ss.269TG](#) and [269TJ](#) of the [Customs Act](#), that material injury had been caused to an

Australian industry producing like goods by reason of the "dumping" of the exported goods or by reason of the export subsidy applied to those goods, making appropriate the imposition of dumping duties ([s.8](#) Anti-Dumping Act) or countervailing duties ([s.10](#) Anti-Dumping Act) on the exported goods.

44. **La Doria** submitted that in determining that material injury had been caused to Australian industry either by the use of an export subsidy or by dumping, the Authority failed to take into account the impact on the Australian market of the goods exported to Australia from Thailand. The Authority was satisfied that, other than in a minor respect, canned tomatoes exported from Thailand were not dumped goods but did conclude that the export price was supported by an export subsidy and recommended that a countervailing duty be imposed in respect of like goods from Thailand. **La Doria** contended that, having found that the goods exported from Thailand significantly undercut the price of Australian produced goods, the Authority should have assessed whether the selling price in the market was set by those non-dumped goods and, therefore, whether it could be said that the export price of the goods exported from Italy had any causal connection with the material injury suffered by the Australian industry.

45. To find that material injury had been suffered by the Australian industry it was necessary to identify injury that was not immaterial, insubstantial or insignificant and injury that was more than that likely to occur in the normal ebb and flow of commerce uninfluenced by anti-competitive practices. (See ICI at pp 269-270.) [Section 269TAE](#) of the [Customs Act](#) provides that in determining whether material injury to an Australian industry has been caused or is threatened by reason of any circumstances in relation to the exportation of goods to Australia from the country of export the Minister may have regard to the various matters specified in sub-s.269TAE(1). One of those matters ([para.269TAE\(1\)\(g\)](#)) is the effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had, or is likely to have, on "the relevant economic factors in relation to an Australian industry". Sub-section 269TAE(3) defines "relevant economic factors in relation to an Australian industry" by an exhaustive list of criteria.

46. In so far as the goods exported from Italy and from Thailand both had the benefit of an export subsidy, if it were found that the Australian industry had suffered material injury, it may be said to be properly open to the Authority, and the Minister, to conclude that the goods exported from Italy and Thailand were contributing causes to that injury if any material or incremental injury could be shown to be caused by the assisted exports over and above any detriment caused by other factors. (See ICI at p 271.)

47. However, in so far as the goods exported from Italy matched the prices of goods exported from Thailand, the latter not being dumped goods, it was certainly arguable that the effect on the Australian industry of the goods exported from Thailand required close consideration.

48. The Authority found that notwithstanding the downturn in supply of processing tomatoes from Australian growers in 1989, the Australian market for the sale of canned tomatoes expanded by more than 50 per cent in that year. Imports from the exporting countries under examination by the Authority accounted for 65 per cent, and Australian industry 26 per cent, of that increase in sales. However, the share of Australian industry in that market in that year fell from 71 per cent to 56 per cent. Imports from Thailand were only a minor part of the market.

49. In 1990 the market contracted, the fall in sales being suffered entirely by the Australian industry. In the same year the sales of goods imported from Thailand increased from 6 per cent to 16 per cent of the market. The Authority found that no material injury was suffered by the Australian industry in that year.

50. In 1991 the Australian market increased marginally but sales by the Australian industry increased substantially. The increase in sales by the Australian industry was principally at the expense of imports from countries other than the exporters being reviewed by the Authority. Thailand maintained its share of the market at approximately 15 per cent and only Italy exported more canned tomatoes to Australia than Thailand. Italy had 27 per cent of the Australian market in 1991, having held approximately 19 per cent of the market in 1988.

51. It was open, but not obligatory, for the Authority to conclude that material injury to the Australian industry was not causally related to the goods exported from Italy, either as dumped goods or goods enjoying the benefit of an export subsidy. The Authority had to make a decision on that issue after considering all relevant material and applying a practical approach to the assessment. (See ICI at p 270.) To treat the exports from Thailand as the principal cause of the injury and the exports from Italy as an inconsequential or trivial contribution thereto, would not have been a reasoned conclusion unless the sales of goods exported from Thailand held a dominant position in the market. (See Enichem at pp 190-192.) The Authority reached its decision after considering various matters including the suppression of the market price to which non-dumped exports from Thailand may have contributed but so did the substantial volume of exports from Italy found by the Authority to have been dumped. It also examined a marked fall in profitability in the Australian industry in the 1991 year and had regard to the significant increase of stocks of canned tomatoes retained on hand by local manufacturers. There was evidence from which the Authority and the Minister could conclude that material injury had been caused to the Australian industry and that imports of dumped and subsidised goods from Italy had contributed to that injury.

52. If that were all no error would have been demonstrated in the manner in which the Authority approached the question of determining whether the goods exported from Italy had been the cause of material injury to the Australian industry.

53. However, the conclusion that dumped goods exported from Italy were the cause of material injury to the Australian industry was conditioned by a conclusion as to the extent to which the Italian goods were dumped goods having regard to the normal value of the goods calculated by the Authority. If that calculation of normal value was based on error, as I have found it to be, consequential conclusions as to the impact of those goods based upon that assumption of value become equally flawed. Secondly, the Authority failed to calculate the extent, if any, to which the export subsidy was reflected in the export price of the goods exported from Italy. The Authority noted that the exporters claimed that the subsidy had not been taken into account in setting the export price and made no finding that  **La Doria**  had incorporated the benefit of that subsidy in the price of its goods to Australian importers. Until a determination is made of the extent to which the export subsidy bears upon the export price, it is not possible to conclude that the exported goods, by reason of that subsidy, can be the cause of material injury to the Australian industry. (See Castle Bacon at pp 18-19.)

54. Furthermore, before any finding of causation of material injury and liability to the imposition of dumping and countervailing duties could be made, it was necessary that the

Authority perform its functions and exercise its powers in the manner required by the [ADA Act](#).

55. Although the [Customs Act](#) does not direct the Minister in the same terms as [s.10](#) of the [ADA Act](#) directs the Authority, it must follow that the obligation upon the Authority to have regard to Government policy and Australia's obligation not to impose duties to assist Australian industries to compete with imports or to protect those industries from the need to adjust to changing economic conditions in carrying out its function of determining whether the Minister ought to be satisfied that material injury had been, or is likely to be, caused to an Australian industry would be a matter to which the Minister also would be required to have regard in determining whether he was so satisfied and in deciding whether to impose countervailing and dumping duties against goods exported to Australia as competing imports. The imperative instruction to the Authority in [s.10](#) of the [ADA Act](#) provides a clear indication of a matter to which the Minister is obliged to give regard in exercising his discretion under [ss.269TG](#) and [269TJ](#) of the [Customs \[1986\] HCA 40](#); Act. (See *Minister for Aboriginal Affairs v. Peko-Wallsend Limited* ([1986](#)) [162 CLR 24](#).)

56. The Report did not inform the Minister of any consideration the Authority had given to the requirements of [s.10](#) of the [ADA Act](#). The Minister did not receive the assistance from the Report the legislation intended the Report to provide and the omission led to the Minister omitting from his consideration a matter to which he was obliged to give regard. The Minister's decision that the goods exported from Italy had caused material injury to the Australian industry and the exercise of the Minister's discretion to impose dumping and countervailing duties involved an error of law in that the Minister failed to take into consideration a matter the Minister was bound to consider.

57. It follows from the foregoing that orders should be made setting aside the Minister's decisions and declarations pursuant to sub-ss.269TG(1), (2) and sub-ss.269TJ(1), (2) of the [Customs Act](#) that ss.8 and 10 of the Anti-Dumping Act applied to canned tomatoes exported from Italy to Australia and the decisions and directions of the Minister under sub-ss.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. Furthermore, the decisions of the Authority to recommend that the Minister make decisions, declarations and directions under sub-ss.269TG(1), (2) and 269TJ(1), (2) of the [Customs Act](#) and sub-ss.8(5) and 10(5) of the Anti-Dumping Act also must be set aside.