FEDERAL COURT OF AUSTRALIA

Nufarm Australia Ltd v Dow AgroSciences Australia Ltd (No 2) [2011] FCA 757

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| Citation: | Nufarm Australia Ltd v Dow AgroSciences Australia Ltd (No 2) [2011] FCA 757 |
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| Appeal from: | Dow AgroSciences Australia Limited and Chief Executive Officer of Customs and Nufarm Australia Ltd (Party Joined) [2010] AATA 859  |
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| Parties: | **NUFARM AUSTRALIA LTD v DOW AGROSCIENCES AUSTRALIA LTD and CHIEF EXECUTIVE OFFICER OF CUSTOMS** |
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| File number: |  |
|  |  |
| Judge: |  |
|  |  |
| Date of judgment: | 5 July 2011 |
|  |  |
| Catchwords: | **TAXation** – Customs and excise – appeal from Administrative Appeals Tribunal – Tariff Concession Order – substitutable goods – goods produced in Australia – ordinary course of business – whether error of law – failure to ask correct question – denial of procedural fairness – whether reasonable apprehension of bias by prejudgment– whether errors material  |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) ss 43 and 44*Customs Act 1901* (Cth) ss 269B, 269C, 269D, 269E and 269P  |
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| Cases cited: | *Amcor Ltd v Comptroller-General of Customs* (1988) 79 ALR 221 distinguished*Barbosa v Di Meglio* [1999] NSWCA 307 cited*Chief Executive Officer of Customs v AMI Toyota Limited* (2000) 102 FCR 578 discussed*Civil Aviation Safety Authority v Ovens* [2011] FCAFC 75 cited*Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389 referred to*Comcare v Broadhurst* [2011] FCAFC 39 considered*Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 57 followed*Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 discussed*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 cited*Hyundai Automotive Distributors v Australian Customs Service* (1998) 81 FCR 590 applied*Industry Research & Development Board v Bridgestone* *Australia Ltd* (2001) 109 FCR 564 citedIndustry Research and Development Board v Bridgestone Australia Ltd (2004) 136 FCR 47 cited*Livesey v New South Wales Bar Association* (1983) 151 CLR 288 cited *Laws v The Australian Broadcasting Tribunal* (1990) 170 CLR 70 applied*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 followed*North Australian Cement Limited v Federal Commissioner of Taxation* (1989) 89 ATC 4765 cited*Plaintiff M61/2010E v Commonwealth of Australia* (2010) 272 ALR 14 cited*Politis v FCT* (1998) 16 ALD 707 cited*Riverwood Cartons Pty Ltd v Chief Executive Officer of Customs* (1997) FCR 493followed*Seguin Moreau, Australia v Chief Executive Officer of Customs* (1977) 77 FCR 410 explained *Stead v State Government Insurance Commission* (1986) 161 CLR 141 followed |
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| Dates of hearing: | 4 and 5 July 2011 |
|  |  |
| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 134 |
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| Counsel for the Applicant: | Mr RM Niall SC and Mr CJ Horan |
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| Solicitor for the Applicant: | Arnold Bloch Leibler |
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| Counsel for the First Respondent: | Mr JH Slonim |
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| Solicitor for the First Respondent: | Mason Sier Turnbull |
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| Counsel for the Second Respondent: | Mr SB Lloyd SC and Miss H Younan |
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| Solicitor for the Second Respondent: | Australian Government Solicitor |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 1017 of 2010 |

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| ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL |

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| BETWEEN: | NUFARM AUSTRALIA LTDApplicant |
| AND: | DOW AGROSCIENCES AUSTRALIA LTDFirst RespondentCHIEF EXECUTIVE OFFICER OF CUSTOMSSecond Respondent |

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| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 5 JULY 2011 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Administrative Appeals Tribunal dated 3 November 2010 be set aside.
3. The entire case be remitted to the Tribunal to be heard and decided again.
4. Tariff Concession Order 0717217 notified in the *Gazette* on 22 December 2010 be set aside with effect from the date of its making.
5. The first respondent pay the applicant’s costs of the appeal

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court’s website.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL |

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| BETWEEN: | NUFARM AUSTRALIA LTDApplicant |
| AND: | DOW AGROSCIENCES AUSTRALIA LTDFirst RespondentCHIEF EXECUTIVE OFFICER OF CUSTOMSSecond Respondent |

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| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

## Introduction

This is an appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (“AAT Act”) from a decision of the Administrative Appeals Tribunal (“the Tribunal”) given on 3 November 2010. The appeal is, by s 44, limited to a question or questions of law.

The decision of the Tribunal was that:

The decision under review is SET ASIDE and REMITTED to the Respondent with the direction that the Tariff Concession Order sought by the Applicant be granted.

As a matter of substance that order was made under s 43(1)(c)(i) of the AAT Act, setting aside the decision under review and making a decision in substitution for the decision so set aside, since no reconsideration within s 43(1)(c)(ii) by the then respondent was contemplated or involved.

The applicant to the Tribunal, Dow AgroScience (Australia) Ltd (“Dow”), had lodged with the Chief Executive Officer of Customs (“CEO”) on 12 October 2007 an application for a Tariff Concession Order (“TCO”) for goods ultimately identified as:

PRECURSERS, HERBICIDE, having BOTH of the following:

(a) NOT less than 96% trifluralin; and

(b) nitrosamine NOT greater than 0.4 parts per million.

Nufarm Australia Limited (“Nufarm”) lodged an objection to the making of the TCO on 13 December 2007.

On 14 March 2008 the CEO decided that the TCO should not be granted as Nufarm produced substitutable goods in Australia in the ordinary course of business. On 10 July 2008 a reconsideration decision affirmed the CEO’s decision not to grant a TCO.

## The legislation

Part XVA of the *Customs Act 1901* (Cth) deals with tariff concession orders. Section 269P(1) relevantly provides:

(1) If a TCO application in respect of goods . . . has been accepted as a valid application under section 269H, the CEO must decide, not later than 150 days after the gazettal day, whether or not he or she is satisfied, having regard to:

(a) the application; and

(b) all submissions lodged . . .; and

(c) all information supplied . . .; and

(d) any inquiries made by the CEO;

that the application meets the core criteria.

“Core criteria” is dealt with in s 269C as follows:

For the purposes of this Part, a TCO application is taken to meet the core criteria if, on the day on which the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business.

Thus the key date in the present case is 12 October 2007. It is by reference to that date that the decision-maker, whether the CEO or the AAT, must be satisfied of the negative, that is, that no substitutable goods were produced in Australia in the ordinary course of business.

Section 269B(1) defines “substitutable goods” as follows:

***substitutable goods***, in respect of goods the subject of a TCO application or of a TCO, means goods produced in Australia that are put, or are capable of being put, to a use that corresponds with a use (including a design use) to which the goods the subject of the application or of the TCO can be put.

It is also to be recalled that by s 269B(3):

(3) In determining whether goods produced in Australia are put, or are capable of being put, to a use corresponding to a use to which goods the subject of a TCO, or of an application for a TCO, can be put, it is irrelevant whether or not the first-mentioned goods compete with the second-mentioned goods in any market.

The older cases have to be read in light of the forms of the legislation before 1996 which involved an examination of the market and issues stemming from that examination.

Section 269D(1) relevantly deals with “goods produced in Australia” as follows:

(1) For the purposes of this Part, goods, other than unmanufactured raw products, are taken to be produced in Australia if:

(a) the goods are wholly or partly manufactured in Australia; and

(b) not less than ¼ of the factory or works costs of the goods is represented by the sum of:

(i) the value of Australian labour; and

(ii) the value of Australian materials; and

(iii) the factory overhead expenses incurred in Australia in respect of the goods.

Lastly, s 269E(1) deals relevantly with “in the ordinary course of business”:

(1) For the purposes of this Part, other than section 269Q, goods (other than made-to-order capital equipment) that are substitutable goods in relation to goods the subject of a TCO application are taken to be produced in Australia in the ordinary course of business if:

(a) they have been produced in Australia in the 2 years before the application was lodged; or

(b) they have been produced, and are held in stock, in Australia; or

(c) they are produced in Australia on an intermittent basis and have been so produced in the 5 years before the application was lodged;
and a producer in Australia is prepared to accept an order to supply them.

## The Tribunal’s reasons

The substantive issues before the Tribunal were, first, whether certain goods were substitutable goods; second, whether those goods were produced in Australia; and third, whether such production was in the ordinary course of business. In each case the issue was to be determined by reference to the statutory definitions I have set out above.

The Tribunal noted that although Nufarm, in its original objection notice, referred only to Trifluralin Technical and the product formulated from that precursor, namely TriflurX, as substitutable goods, its amended statement of facts and contentions filed with the Tribunal on 13 August 2010 raised the contention that 2, 4-Dichlorophenoxyacetic acid (“2, 4-D acid”) was also substitutable goods.

### Substitutable goods

The Tribunal found that Trifluralin Technical was the active ingredient in the manufacture of a range of agricultural herbicides.

It found that Trifluralin Technical and 2, 4-D acid were both herbicide precursors, meaning that in Australia they were not used directly to kill weeds but rather were formulated so as to advance their uptake.

As at the relevant date Trifluralin Technical was not permitted in Australia to be applied directly to the soil.

2, 4-D acid had no use except as a precursor for formulated herbicides, trading under names such as Estercide Extra 680.

Where the particular herbicides differed was in their operation.

The important difference between formulations of the two herbicide precursors was that formulations containing Trifluralin Technical were pre-emergent herbicides, which were applied to the soil before sowing of the crop and acted upon the roots of the weeds, whereas 2, 4-D herbicides were or were primarily post-emergent, acting upon the roots of the weeds by being absorbed through the leaves.

There was some evidence, said the Tribunal, of an overlap in the case of sugar cane “but we do not see this one off application of a post-emergent herbicide as affecting the issues”.

The Tribunal said that both Nufarm and the CEO submitted that 2, 4-D acid was substitutable for Trifluralin Technical. The Tribunal identified their argument as being that substitutability had to be decided with respect to herbicides generally. (I note that those parties submitted to me that their argument before the Tribunal had been that the herbicides were used to kill the same weeds in the same crops. I return to this issue below.)

The Tribunal disagreed with the approach that substitutability had to be decided with respect to herbicides generally. It said that formulations of Trifluralin Technical acted as pre-emergent herbicides and were therefore applied to the soil before planting. In contrast, 2, 4-D acid formulations acted as post-emergent herbicides and their particular times of application and means of killing weeds were quite different. The Tribunal said that to simply refer to pre-emergent and post-emergent herbicides generally as herbicides made the same kind of error that the Tribunal rejected in *Seguin Moreau, Australia v Chief Executive Officer of Customs* (1977) 77 FCR 410 (“*Seguin Moreau*”).

The Tribunal then considered the facts of *Seguin Moreau.* The Tribunal said it was satisfied that because of their different properties,Trifluralin based herbicides were not substitutable for 2, 4-D formulated herbicides and vice versa.

### Goods produced in Australia

The Tribunal then went on to consider the question of “goods produced in Australia”, an expression used in the definition of “substitutable goods” and given its meaning by s 269D(1), which I have set out above.

The Tribunal concluded that it was not possible, on the balance of probabilities, to ascertain whether the not less than ¼ of costs element in s 269D(1)(b) was satisfied in respect of Trifluralin Technical.

Among the findings it made on this issue were that Nufarm had been dilatory and at times unresponsive in providing relevant information requested and that Nufarm did not provide information, even under summons.

### Ordinary course of business

The expression “ordinary course of business” is also used in the definition of “substitutable goods”: it is given its meaning by s 269E(1) which I have set out above.

The Tribunal considered evidence that in January 2007, thirty two 250 kilogram drums of Trifluralin Technical were manufactured by Nufarm for sale to an associated company. The Tribunal also referred to evidence given on behalf of Nufarm that Nufarm produced Trifluralin Technical annually at its Laverton Plant and in the past and future had been and was prepared to accept orders from customers to supply Trifluralin Technical as a finished good.

The Tribunal therefore concluded that Trifluralin Technical was produced by Nufarm in the ordinary course of business. In particular the Tribunal found that Nufarm had brought itself within s 269E(1)(a) in that Trifluralin Technical in 250 kilogram drums was produced in January 2007, that is, in the two years before the application for the TCO was lodged on 12 October 2007.

### Tribunal’s conclusion

In conclusion, the Tribunal said:

As we cannot be satisfied that [Nufarm] produces substitutable goods in Australia, that is, we cannot be satisfied that the provisions of subs 269D(1) have been met, the decision under review will be set aside and this matter remitted to [the CEO] with the direction that the TCO sought by [Dow] be granted.

In my opinion the Tribunal’s implicit reasoning was that the only substitutable goods were Trifluralin Technical, which had been common ground before it, but those goods were not produced in Australia within s 269D(1). If, contrary to the Tribunal’s conclusion, Trifluralin Technical was produced in Australia then the “ordinary course of business” requirement of s 269E(1) was made out.

The Tribunal considered the s 269D(1) and the s 269E(1) issues only in relation to the goods it found were substitutable and did not consider the s 269D(1) or the s 269E(1) issues in relation to 2, 4-D acid and formulations which it found were not substitutable goods. It is on this basis, I infer, that the CEO’s submissions before me were that if, as the CEO contended, the Tribunal erred in law on the issue of substitutable goods, then the matter should be remitted to the Tribunal.

## The Appeal

Nufarm’s notice of appeal dated 25 November 2010 stated the following questions of law:

1. In determining whether goods are substitutable for the goods the subject of the application (the ‘**TCO goods**’) under s.269B of the *Customs Act 1901* is it necessary that the two sets of goods achieve the same use by the same means or is it sufficient that at least one use is the same regardless as to how or what means are deployed to attain that use?

2. Was the Tribunal obliged to accord the Applicant procedural fairness and if so did it fail to do so by reason of:

2.1 a reasonable apprehension of bias;

2.2 a failure to deal with the submission and claims of the Applicant; and/or

2.3 a failure to put adverse material or conclusions for comment.

I now turn to the detail of the grounds.

## Substitutable goods

Under the heading “Grounds of Appeal” ground 4 is as follows:

4. The Tribunal erred in law in finding that 2, 4-D acid and/or formulations were not ‘substitutable goods’ in respect of Trifluralin Technical within the meaning of s.269B.

* 1. The Tribunal misconstrued or misapplied s.269B by asking whether 2, 4-D acid formulations and Trifluralin formulations differed in the means of killing weeds.
	2. The Tribunal should have asked whether 2, 4-D acid and/or formulations were capable of being put to a use that corresponds with a use (including a design use) to which Trifluralin Technical can be put, including by being used to kill the same weeds in the same crops.

In its written submissions to the Court, Nufarm submitted that the question posed by s 269B was whether 2, 4-D acid or formulations such as Estercide Extra 680 were put, or were capable of being put, to a use that corresponds with the use (including a design use) to which Trifluralin Technical can be put.

It was submitted that corresponding use is a broad concept which focuses on the ultimate use or the end result achieved by the goods and not the means by which that use or result is achieved.

It was then submitted that rather than examining and comparing the end use of the two chemicals the Tribunal decided substitutability by asking itself whether the two compounds achieved their objective through different means. Reference is made to [17], [24] and [27] of the Tribunal’s reasons.

The submission continued that the Tribunal misunderstood and misapplied the decision of Drummond J in *Seguin Moreau* (above).

The second respondent, the CEO, submitted that the findings of the Tribunal revealed two errors of law:

(a) The Tribunal construed ‘use’ by reference to the means by which the use is achieved, thereby unduly limiting the definition of ‘substitutable goods’ in s 269B of the *Customs Act*.

(b) Even if one were to accept this approach, the Tribunal dismissed evidence of an overlap of ‘use’ as irrelevant to the question of substitutability.

As to the former of these propositions, the CEO’s submission was that the word “use” in s 269B denotes an end result, object or purpose and does not refer to the manner in which the goods achieve the result.

The first respondent, Dow, submitted the appeal should be dismissed because, as to question 1, it did not identify any question of law. Alternatively, the Tribunal’s decision did not involve any error of law.

As I understand Dow’s written submissions on this point, they rely on the decision of Drummond J in *Seguin Moreau.*

In *Seguin Moreau*, the applicant’s unsuccessful application for a TCO was for “barrels, oak of the scientific name Quercus Robur and Quercus Petraea, of a kind used for the storage of wine during the maturation process in the production of table wine”: see the report at 411C-D.

At that time the definition of “substitutable goods” in s 269B(1) was “goods produced in Australia that are put to a use that corresponds with a use (including a design use) to which the goods the subject of the application or the TCO can be put”. But another core criterion was “the granting of the TCO was not likely to have a significant adverse effect on the market for the substitutable goods”.

The evidence in that case was that the French oak barrels were not interchangeable with American oak barrels for particular wine making styles. As such, said the Tribunal in that case, the market for substitutable goods which may be significantly adversely affected by the grant of the TCO was the market for French oak barrels. The Tribunal also said that the use of French oak barrels was not merely the storage of wine and it was not irrelevant whether the barrel was constructed of French oak or American oak.

The crucial part of Drummond J’s judgment on the question of “substitutable goods” is at page 414 where his Honour said the Tribunal:

… was also right to identify those [substitutable] goods as limited to locally made

French oak barrels, once it concluded that French oak barrels were not interchangeable in use with American oak barrels, a factual conclusion the correctness of which is not attacked.

The approach of Drummond J does not support the conclusion of the Tribunal in the present case. It stands as no authority on the present question of whether goods are substitutable, first because the conclusion in question was factual, that conclusion being that French oak barrels were not interchangeable in use with American oak barrels, and second because that finding was not in issue before the Court: see page 414D.

Further, there is no precedent value in findings of fact: *North Australian Cement Limited v Federal Commissioner of Taxation* (1989) 89 ATC 4765 at 4768.

In relying on *Seguin Moreau* as it did the present Tribunal was led into error in its construction of “substitutable goods” as defined.

In my view the present Tribunal could not reason as it has done to find that the goods were not substitutable goods. Merely to say that one herbicide operates in a different manner to another does not establish that the goods were not substitutable because it leaves open that the goods have a corresponding use, that is, in killing the same weeds in the same crops.

The relevant register (see *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389 at 398-402) is not science but trade and commerce.

I reject the submission made by Dow that this ground does not raise a question of law: see *Industry Research & Development Board v Bridgestone Australia Ltd* (2001) 109 FCR 564 at [62].

Dow also submitted that what the Tribunal had in mind was that there was no evidence of sufficient weight relating to practical use of the goods. Dow submitted that properly read in light of *Politis v FCT* (1998) 16 ALD 707this was the Tribunal’s reasoning. Dow criticised the approach taken by the CEO and by Nufarm in the Tribunal which was to proceed by reference to labels and by cross-examining one of Dow’s witnesses rather than calling a user such as a farmer.

This however was not the reasoning of the Tribunal. There was no reference in its reasons to insufficient weight or indeed to labels. In my view these matters argued by Dow go to the merits rather than to the issue of whether the Tribunal asked itself the wrong question and failed to ask itself the right question. The Tribunal did not say that the evidence of use was of no weight or of too slight a weight.

Neither is it possible to construe the Tribunal’s references to pre-emergent and post-emergent properties or methods of use as meaning that it was not satisfied in a commercial or practical sense of overlap in use between the two products.

In my view Dow’s submission is not made out. Nowhere expressly or by implication does the Tribunal ask the correct questions but focuses instead on scientific matters such as the properties of the goods or how they work.

A practical analysis would be:

1. what are the TCO goods?
2. to what use or to what uses are they put or can they be put?
3. what are the goods claimed to be substitutable?
4. to what use or to what uses are they put or are they capable of being put?
5. are the uses in (ii) and (iv) or any of them corresponding uses?

In my view such an analysis or thought process is absent from the Tribunal’s reasons, reading them favourably as required by *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

I use the expression “any of them” in (v) above in light of the statement by Goldberg J in *Riverwood Cartons Pty Ltd v Chief Executive Officer of Customs* (1997) 77 FCR 493 at 497. The Tribunal set out the relevant passage at [21] of its reasons but on my reading of its reasons did not apply it.

In my opinion, the failure by the Tribunal to ask itself the right question is confirmed by its failure to address the issue of whether the same weeds in the same crops were or could be killed or controlled by the goods in question or their formulations. It was necessary for the Tribunal to deal with that because it was raised on the evidence and it was also argued by the CEO and by Nufarm before it but not dealt with except perhaps at [19] in relation to sugarcane. There the Tribunal said it did not see that material as affecting the issues. I infer that this was because the Tribunal looked only at the times and means of killing weeds and on that insufficient basis concluded that the goods were not substitutable.

Counsel for Dow accepted before me that the matter of the goods killing the same weeds in the same crops was argued before the Tribunal but submitted that it was not sufficiently clearly put. I reject this submission.

To be clear, I also reject the submission put by Dow that [19] of the Tribunal’s reasons related to the insufficient cogency of the evidence of overlapping use, at least in a commercial or practical sense. This was not what the Tribunal said. Its reasoning was in effect that because of its conclusion on method it did not need to consider the submissions and evidence as to the overlapping use in respect of weeds and crops. In addition, if it had rejected the evidence, instead of treating it as irrelevant, the Tribunal could have addressed both the use and capable of use limbs of the required analysis.

For myself I cannot see that the evidence in respect of the use of the products on the labels was not cogent: it is enough for present purposes to say it was not irrelevant and should have been dealt with by a tribunal properly understanding its task

## Goods produced in Australia

The next part of the appeal goes to the issue of whether the goods were produced in Australia. This is an aspect of the definition of “core criteria” which I have set out above.

Here the submission by Nufarm is that the Tribunal denied it procedural fairness, in that it made adverse findings in relation to Nufarm without giving it an opportunity to be heard in relation to those findings. The particulars are:

The Tribunal found (at paragraph 52(1)) that the Applicant had been dilatory and at times unresponsive in providing relevant information requested.

The Tribunal declined to hear submissions from the Applicant in relation to the question of its compliance with any summons for production of documents relating to the proceeding (Transcript, 27 August 2010, page 10, lines 30-34).

The argument is that at [52] one of the findings on the basis of which the Tribunal held that Trifluralin Technical was not goods produced in Australia by Nufarm was:

Nufarm, the party joined, has been dilatory and at time unresponsive in providing relevant information requested.

Indeed at [52] the Tribunal not only referred to Nufarm having been dilatory and at times unresponsive in providing relevant information requested but also at [52(4)] said that it noted and accepted counsel for Dow’s submission that Nufarm did not provide information, even under summons.

In transcript dated 26 August 2010, then but no longer confidential, there is recorded an application by counsel for Dow which seemed to centre on the existence of other TCOs. In passing, there was a submission, which was not developed, that the evidence from the witnesses for Nufarm had to some extent been carefully compartmentalised so that, for example, one witness had not read the outline of evidence of another witness. This had something to do with the question of whether the goods were produced in Australia within the meaning of s 269D. There were then references to an earlier interlocutory hearing concerning a summons or leave to issue a summons. Counsel for Dow said that the question was resisted and fought tooth and nail by Nufarm.

At one stage, after some eight pages of transcript the representative for the CEO said:

Well, what is the application and why is everyone being excluded?

Counsel for Nufarm made certain submissions about the application and then said as follows:

Along the way, it took a long time to get to the punch, but there were numerous comments made about compliance with summons. I can’t answer those without taking instructions, so to the extent that Mr Slonim wants to raise any issues about compliance with summons, I am quite happy to answer them, but I have to take instructions before I respond to anything of that nature.

It appears that counsel for Nufarm had not been long briefed or briefed in relation to the earlier interlocutory hearings.

In closing submissions on 27 August 2010 counsel for Dow had briefly referred to a similar issue as to compliance with summonses and counsel for Nufarm said:

- well, there’s one further thing before I come to the issues. The question of compliance with the summons and all of the interlocutory skirmishes, if I might call them that – I don’t want to address the Tribunal on those, because I don’t see how that ---

Mr Allen: Well, it is not going to assist us now.

Mr Horan: That’s right. If the tribunal pleases.

In its written submissions Dow refers first to the directions hearing on 20 April 2010. There was then reference to the cross-examination of Mr O’Donnell on 25 August 2010 in the course of the final hearing. In my view, in light of the Tribunal’s comment “Well, it is not going to assist us now” none of this other material answers the point, nevertheless I will next consider it.

There is some evidence in the transcript of 25 August 2010 at page 21, that may be seen to go to the question of compliance or non-compliance but is in my view ambiguous.

Counsel for Dow read out the following:

All documents that comprise “the cost review analysis” conducted by Michael James O’Donnell and described in paragraphs 4 to 7 (both inclusive) of his outline of evidence dated 9 July 2009.

The question was then asked “does that meet the description I just read out to you?”

The answer was:

[T]his document is all that I have that comprises what I have as the cost review analysis. I don’t have other documents that are sitting with this as supplementary information.

Question:

But you could have produced the documents that you described and consulted . . . such as the budgets or the management accounts that you went to?

Answer:

Those documents exist.

Earlier on the same day the transcript at page 15 records the following:

Question:

And you said before, in response to a question from your barrister, that you had consulted various managers who had input about allocation of expenses and their area – things like that. That would have generated a lot of documentation?

Answer:

Probably not. Again, if I go back to my earlier comment, this is an exercise which is done for technical people looking at their own areas in as a proficient and easy method as possible. I think in some of the discussions so far if we were being asked to prepare such documentation for a case such as this then I would expect that we would go about it quite differently.

These questions and answers, which were relevant to the cogency of the material as much as to process, do not in my view mean that the issue of compliance or non-compliance with summonses or the production of material or the responsiveness or otherwise in terms of providing relevant information was an issue critical to the decision which was apparent from its nature or the terms of the statute under which it was made within the principle in *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592 (“Alphaone”). I note that *Alphaone* was approved in *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [9].

In my view, if this matter of process was going to be taken into account it would have to have been clearly evident from the course of the proceedings that that was a course open to be taken. In the present case not only was that not drawn to the attention of Nufarm in a positive way but in fact the comment of the presiding member which I have set out above confirmed that the process issue was not a live one and that Nufarm did not need to deal with it.

I thus find that there was a procedural defect which materially affected the Tribunal’s decision on the substantive issue of “goods produced in Australia”. It is not to the present point whether the Tribunal had a basis for its findings and it is not for the Court to examine that issue. Neither does the Court have to analyse whether the other findings made by the Tribunal could have been made without the impugned findings: see the discussion of *Stead’s* case below in the context of materiality. There I refer to the test for denial of procedural fairness being that the lack of procedural fairness *could not* have affected the outcome: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-147.

I reject the submission by Dow that these findings of fact were gratuitous and not related to the Tribunal’s reasoning. It is not for the Court to disaggregate the Tribunal’s express reasoning in this way and to assume that findings of fact which immediately precede those reasons were irrelevant. In that regard [58] of the Tribunal’s reasons are also relevant in harking back to the earlier findings.

## Reasonable apprehension of bias

The particulars of this claim are that on the afternoon of the third day of hearing on 25 August 2010, before the evidence had concluded and before closing submissions had commenced, the presiding member made a comment that ‘things should be fairly clear even now which way it is going to go’ (transcript, 25 August 2010, page 88, lines 25-26). Related to this, it is submitted, the Tribunal erred in refusing an application made by Nufarm on 26 August 2010 that the Tribunal disqualify itself from the further hearing and determination of the proceeding on the ground of reasonable apprehension of bias.

The next particular was that there was unequal treatment by the Tribunal in the manner in which the applicant and the joined party respectively were permitted to present their cases, including in particular: the Tribunal declined to receive or consider evidence on the basis of a pre-judgment on a contested question of statutory construction; and the Tribunal unduly limited the evidence of witnesses called by the joined party (transcript, 25 August 2010, pages 49-50, 51, 69 (lines 31-39), 70, 71). I agree with counsel for Dow that this aspect of prejudgment was only lightly touched on in oral submissions on behalf of Nufarm.

The principle invoked on behalf of Nufarm is that a fair minded observer might reasonably apprehend that the Tribunal’s mind was so prejudiced in favour of a conclusion already formed that the Tribunal might not alter that conclusion irrespective of the evidence and arguments presented: *Laws v The Australian Broadcasting Tribunal* (1990) 170 CLR 70 at [100] per Gaudron and McHugh JJ. Their Honours said:

When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker’s mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her.

I accept that in this context there is a double “might” involved in the test: see *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-4 and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344.

As I have said, Nufarm founds this aspect of the case on a comment made by the presiding member on the afternoon of the third day of the hearing which was at a point before the evidence had concluded and before closing submissions had commenced. The context was that counsel for Dow had said that he could start his closing submission on the following afternoon “even if we adjourn for maybe another hour after evidence”. The presiding member said:

Well, even half an hour, they – things should be fairly clear even now which way it is going to go.

This is too slender a thread on which to hang a case of reasonable apprehension of bias by prejudgment. In this context prejudgment means a closed mind: see *Laws* (above).

I take into account the contemporaneous reaction, or lack of reaction, by counsel for Nufarm who said “it sounds like I should not need to say very much”. I note that an application that the Tribunal disqualify itself was made the next morning so that there can be no question of waiver. In my view there is at least an ambiguity in the words “which way it is going to go” as indicating not the result but the course of argument in light of the distillation of issues during the course of the hearing. I also take into account the use of the qualifier in the expression “fairly clear”. Further, there is no indication that the statement was unfavourable to Nufarm.

Counsel for Nufarm put the matter by reference first to the words themselves which he submitted were unambiguous and emphatic and going to the ultimate issue; second the immediate context, which was how long counsel needed to be in a position to make submissions the next day once the evidence was concluded; third, the broader context of robust questioning by the Tribunal of lines of argument by counsel for Nufarm; and fourth the reasons given by the Tribunal for refusing to disqualify itself.

I have read the entirety of the transcript and I have considered these submissions separately and cumulatively. I do not find that prejudgment, that is a mind closed to persuasion and argument, has been established, firmly or otherwise.

Robust questioning of or hostility towards a particular argument or scepticism about an argument does not mean that the Tribunal has a closed mind.

 As Mason P observed in *Barbosa v Di Meglio* [1999] NSWCA 307 at [9]:

 . . . the litigant's right is to have a tribunal that is free of prejudgment. The litigant is not entitled to a tribunal that is predisposed to accept or reject any particular proposition. An open mind is not an empty one.

## Ordinary course of business

In light of my conclusion on substitutable goods it is probably not necessary for me to deal with this point: the finding of the Tribunal is limited to Trifluralin Technical and does not deal with other goods which the Tribunal may find are substitutable goods on the correct test. Nevertheless I shall consider the submission so as to deal with all the issues raised and argued before me.

 It is said by Dow that the Tribunal fell into error in finding that Nufarm produced Trifluralin Technical “in the ordinary course of business” within the meaning of s 269E. The submission is that the only evidence that was given with regard to the production of Trifluralin Technical was the manufacture of thirty two 250 kilogram drums of Trifluralin Technical in or about January 2007 for sale to a related company.

The Tribunal answered its question:

Were the goods produced [in Australia] in the ordinary course of business

“yes” on the basis not only of the manufacture and sale of thirty two 250 kilogram drums of Trifluralin Technical in January 2007 but also on the basis of the Tribunal’s acceptance of the evidence of Mr O’Donnell, the operations manager for Nufarm, that Nufarm produced Trifluralin Technical annually at its Laverton Plant and in the past and future had been and was prepared to accept orders from customers to supply Trifluralin Technical as a finished good.

It could not be said, and the argument was disavowed by counsel for Dow, that it was not open to the Tribunal properly construing s 269E(1)(a) to find that thirty two 250 kilogram drums were not produced in Australia within s 269E(1)(a). The proposition that the Tribunal misconstrued “they have been produced in Australia” is not made out. *Amcor Ltd v Comptroller-General of Customs* (1988) 79 ALR 221 at 231-232 was dealing with quite different words and it would be unsafe to use that decision as an aid to construction of the existing provision.

On the proper construction of the provision in my view the Tribunal’s reasoning is sufficiently clear.

In my opinion no error of law is made out.

## Failure to address a claim

This ground is that the Tribunal denied procedural fairness, in that it failed to address one of the bases for Nufarm’s case that 2, 4-D acid was a substitutable good for the TCO goods. The particulars are:

The Tribunal wrongly characterised the evidence and submissions of the Applicant as requiring the question of substitutability to be assessed by reference to herbicides generally, whereas the Applicant had in fact submitted that 2, 4-D acid was substitutable for the TCO goods not simply because it was a precursor herbicide but because 2, 4-D acid formulations could be used to kill the same weeds in the same crops.

The Tribunal failed to consider and/or address the evidence that showed that some of the weeds killed by formulations of the TCO goods were the same as those killed by formulations of 2, 4-D acid.

The basis for this submission is [19] of the Tribunal’s decision in the following terms:

[19] There was some evidence of an overlap in the case of sugarcane but we do not see this one off application of a post-emergent herbicide as affecting the issues.

The Tribunal thus reasoned that the overlap of use was irrelevant to the question of substitutable goods. So viewed, the statement by the Tribunal may be regarded as going to the question of misconstruction of the phrase “capable of being put, to a use that corresponds with a use” within the meaning of “substitutable goods” or, indeed, to the misconstruction of the use question as well as the capable of use question.

The Tribunal’s approach seems to be inconsistent with the decision of Goldberg J in *Riverwood Cartons Pty Ltd v Chief Executive Officer of Customs* (1997) 77 FCR 493 at 497D-E, where his Honour said:

“Substitutable goods” are goods produced that are put to a use that corresponds with a use to which the relevant imported goods can be put. There is no requirement that substitutable goods have only one use. The definition will be satisfied even if the substitutable goods (in this case, corrugated fibre board) have a number of uses, only one of which corresponds with a use to which the imported goods can be put.

The Tribunal set out this paragraph at [21] of its reasons but failed to apply it.

As to the failure to address the claim founding a question of law within s 44 of the AAT Act, Nufarm relies on *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at [24] and [95] (“*Dranichnikov*”) and *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 272 ALR 14 at [90]. See also Minister for *Immigration & Citizenship v SZJSS* (2010) 85 ALJR 306 at [35].

Decisions of this Court are to the same effect but categorise the error as constructive failure to exercise jurisdiction rather than denial of procedural fairness: see *Chief Executive Officer of Customs v AMI Toyota Limited* (2000) 102 FCR 578 at [45]. There, the Full Court said as follows:

Thus, in failing to address a central question raised by the Toyota Australia’s case *and* by thematerial before it, the AAT erred in law. It breached its “duty to arrive at the correct or preferable decision in the case before it according to the material before it” (see *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-425 per Brennan J and *Noble v Repatriation Commission* (unreported, Full Court, Federal Court, 3 November 1997 at pp 15-16). It also failed to apply itself to, and address, the correct legal question which the law prescribes and thereby constructively failed to exercise its jurisdiction: see *Ex parte Hebburn; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420, *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 483 and *Craig v South Australia* (1995) 184 CLR 163 at 179. Thus, the appeal to the primary judge plainly involved a question of law.

Indeed in Industry Research and Development Board v Bridgestone Australia Ltd (2004) 136 FCR 47 per Tamberlin, Sackville and Selway JJ at [26], the Full Court read *Dranichnikov* as concerned with constructive failure to exercise jurisdiction.

The claim made by Nufarm, with support from the CEO, was that 2, 4-D acid was substitutable with Trifluralin Technical on the basis that there was an overlap in the types of weeds killed or controlled in certain crops. A related claim was that there was some overlap in relation to pre-emergent and post-emergent means of killing, particularly in relation to sugar cane.

As to the evidence, there is evidence relevant to this issue in the transcript of 24 August 2010 at pages 112 and 117-118 and in the transcript of 25 August 2010 at pages 53, 54, 62 and 68. These references are not exhaustive.

At one of these transcript references (25 August 2010 at page 54) the evidence of Mr Wells, Nufarm’s research and development manager for Australia, was as follows:

Question:

Now, in relation to 2, 4-D formulations, can they have any pre-emergent effects if – for example, if applied before the weed has emerged from a particular field?

Answer:

Yes, they can. It’s dose related. At high rates there’s uses for pre-emergent weed control in some 2, 4-D based products – excuse me – in sugar cane.

There was then some reference to the product Tornado DF as a registered product specific to sugar cane at a pre-emergent stage.

At another of these transcript references (24 August 2010 at pages 117-118) Mr Sharpe, a witness called by Dow, gave the following evidence:

Question:

Now, I put it to you that in respect of a currently registered product, Tornado DF, that a label claim is made, in relation to sugar cane, that the herbicide has both a pre-emergent and post-emergent effect. Now, would you accept that as a proposition?

Answer:

Reading what it says here, then it says:

*When applying before weed emergence, supply at least 350 litres per head to a spray volume*.

That’s all I can say.

Question:

You are agreeing with my proposition that in respect of this product, the label – there is a label that indicates a pre-emergent effect?

Answer:

Correct, and as I said, I was not aware of one that had that. That doesn’t mean to say that there wasn’t one.

At page 112 of the transcript of 24 August 2010 Mr Sharpe gave the following evidence in cross-examination:

Question:

But there is then a[n] area of overlap in the types of weeds that 2,4-D herbicides such as Estercide formulation and Trifluralin formulation such as Trifluralex will be used to control or kill?

Answer:

Correct. That’s not unusual with herbicides. Many of them overlap.

At page 131 of the transcript of 24 August 2010, in cross-examination by the representative of the CEO, Mr Sharpe said:

Question:

Yes, but the same weeds?

Answer:

The same weeds, yes, and I said earlier I think that there are many herbicides that overlap in which weeds they control.

At page 67 of the transcript of 25 August 2010, in cross-examination by the representative of the CEO, Mr Wells said:

Question:

[b]ut does this indicate to you, Mr Wells, that in respect of sugarcane either of these herbicides can be applied at the same time on the same crop to control some of the same weeds?

Answer:

Yes.

Question:

Do you regard that as a corresponding use of a herbicide?

Answer:

Yes.

The sugar cane issue is referred to at pages 117, 128-129, 131 and 132 of the transcript of 24 August 2010 and at pages 54, 66-67 and 69 of the transcript of 25 August 2010. Again, these references are not exhaustive.

In the closing written submissions on behalf of the CEO the point was developed at paragraph 28, with reference to relevant evidence. The closing oral submissions on behalf of the CEO were also before me in the form of the transcript of 27 August 2010. At page 70 the issue was developed with reference to evidence given on 24 August 2010 at transcript pages 110-111, 112 and 131 and on 25 August 2010 at page 67. There was thus substantial evidence and submissions, written and oral, on the issue of the use of the TCO goods and of the claimed substitutable goods in respect of the same weeds and same crops and substantial submissions were directed to that issue.

This material was not dealt with by the Tribunal except in its reference at [19] where it said, in effect, that part of this material, in relation to sugarcane, was irrelevant.

Thus in my opinion not only was there material which confirmed the Tribunal’s first error but also the Tribunal erred in failing to deal with the claim.

If I am wrong in my conclusion that the Tribunal erred in failing to ask itself the right question, that is, even if it asked itself the right question, the Tribunal needed to address and deal with this claim seriously advanced and supported by substantial evidence. It is in my view no answer to say that the evidence was not called by Nufarm or that it emerged by reference to labels and cross-examination of a witness called by Dow. As I have said above there is no reference to the substance of this evidence in the Tribunal’s reasons. This issue is given particular point by the statutory requirement of the Tribunal to be satisfied of the negative posed by s 269C read with s 269P: that is that there were no substitutable goods produced in Australia in the ordinary course of business

## Were the errors of law material?

Dow correctly submits that a decision of the Tribunal will only be set aside if the Tribunal errs in law and the error has a material effect on the Tribunal’s conclusion: Reference is made to the Full Court decision in *Hyundai Automotive Distributors v Australian Customs Service* (1998) 81 FCR 590.

Dow then submits that even if the Tribunal erred in law “its decision would, and should have” been unaffected.

For denial of procedural fairness, the test is that the lack of procedural fairness could not have affected the outcome: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at [145]-[147]. See also the other cases referred to in *Civil Aviation Safety Authority v Ovens* [2011] FCAFC 75 at [35]. Fundamentally this test stems from the nature of judicial review since a tighter test would be likely to involve the court in examining afresh the material before the decision-maker and making its own assessment of it.

The first alternative basis on which this proposition is put by Dow is in relation to a contestable question about the alleged disconformity between the dates on which Nufarm produced Trifluralin Technical in containers and the cost of production at or around that time.

This line of argument appears to seek to involve the Court in inappropriate fact finding where there are no facts on this issue found by the Tribunal.

In my view a disconformity, if there be one, between the dates of production and the cost of production does not lead to the conclusion that “it was not open to the Tribunal on the evidence to conclude that Nufarm produced Trifluralin Technical in Australia within the meaning of s 269D”.

In my view, the language of “not open to the Tribunal on the evidence” does not readily answer the description of a question of law within s 44 of the AAT Act.

In any event this line of argument does not address how the present question would be answered with reference to goods which the Tribunal, on a correct understanding of the law, may find to be substitutable.

The next line of argument is also unsustainable. It is submitted that the Tribunal’s finding as to Nufarm’s failure promptly to disclose information and comply with a summons “was immaterial to its decision, which was based primarily on the evidence of Mr Lavelle”. Even within its own terms this submission is flawed in the present context of judicial review because the word “primarily” does not establish that the Tribunal’s finding was immaterial to its decision. Indeed, it shows that the finding was material to its decision as does the further consideration that the Tribunal set out these findings as the first and last of the findings in relation to its conclusion on “goods produced in Australia” within s 269D.

The submission on this line of argument by Dow is that even if the Tribunal erred in finding that the 2, 4-D acid was not substitutable for Trifluralin Technical this would not have vitiated the Tribunal’s decision because Nufarm’s evidence as to the costs of producing 2, 4-D acid was flawed and unreliable.

Again, this submission seeks to invite the Court into fact finding where the facts are contestable and where on my reading of its reasons the Tribunal has not made a finding.

In short, because the Tribunal erred in law in relation to substitutable goods and made no finding on the “goods produced in Australia” issue or on the “ordinary course of business” issue except in relation to the goods it did find to be substitutable (Trifluralin Technical) then the error was material. Further and alternatively, the Tribunal’s decision on the “ordinary course of business” issue was legally flawed because it denied procedural fairness to Nufarm by deciding that issue in part on Nufarm’s dilatoriness in providing and failure to provide information.

I reject the submission made by Dow that it is sufficiently clear that Mr Duggan’s evidence means there was only one answer in relation to the costs of 2,4-D. For example, the quantity of production of the two goods was quite different and it is not clear that this would have no bearing on costs of production. Further, but equally importantly, the Tribunal’s reasoning was evaluative and might well be affected by the closeness of the costs to the statutory 25%. As I understand it the costs in relation to the goods found by the Tribunal to be substitutable was very near that line whereas the costs in relation to 2, 4-D were much further from that line.

## Orders

 For these reasons I allow the appeal, set aside the decision of the Tribunal and remit the case to the Tribunal to be heard and decided again. There was some suggestion that the Court should make its own findings of fact but in my view the facts in question are contestable and contested and no time would be saved in any event unless the findings the Court made disposed of the whole case. As I understood it, that application was not ultimately pressed.

As to the considerations referred to in *Comcare v Broadhurst* [2011] FCAFC 39; (2011) 120 ALD 228 I prefer to leave the matter to the President. The Tribunal is a mature institution. The President, in deciding the constitution of the tribunal, will be able to take into account all factors including the findings of fact made by the Tribunal as constituted to date and also the fact that that Tribunal made findings at [52] going to the conduct of Nufarm. The President would also take into account the need to revisit findings of fact the Tribunal has made and that the appeal has not been limited to a bare question of statutory construction.

As to costs, I order that the first respondent pay the costs of the applicant. The CEO did not seek an order for costs.

I was informed by counsel that a TCO was in fact gazetted on 22 December 2010 to give effect to the Tribunal’s decision. I allowed, without opposition from the other parties, an application by Nufarm to amend the Notice of Appeal to accommodate that issue. It was submitted that the Court should set aside that December 2010 TCO as an ancillary order if I set aside the Tribunal’s decision.

In my view, the TCO stands or falls with the Tribunal’s decision. As I have said, as a matter of substance that decision was made by the Tribunal under s 43(1)(c)(i) of the AAT Act, setting aside the decision under review and making a decision (the TCO) in substitution for the decision so set aside. Further, it would render the Tribunal’s task embarrassing in a legal sense to have remitted to it the question of making a TCO when a replacement TCO had been made as a result of what I have held to be its flawed decision.

Acting under s 44(4) of the AAT Act I set aside that TCO from the date it was made. It will be for the Tribunal to decide again the question of whether a TCO should or should not be made.

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| I certify that the preceding one hundred and thirty-four (134) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 11 July 2011