AGRONOMIQ
(AGRICHEM MANUFACTURING INDUSTRIES PTY LTD)
A.C.N. 125 437 185

19th November 2012

Mr. Timothy Flor
Supervisor
International Trade Remedies Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra 2601 ACT

Dear Tim,

Re: Investigation into Dumping of 2,4-D:
Response to Nufarm Letter Dated 31st October 2012

We have had the opportunity to read the Nufarm letter dated 31st October 2012.

We have already argued that Nufarm's construction of the price of 2,4-D acid in the domestic market as well as its assessment of the price of Chinese 2,4-D in Australia is incorrect. By its own admission, Nufarm knows very little about what has occurred in the Chinese 2,4-D market since 2008. "Nufarm does not have any further information available to it (since 2008) that indicates Chinese production capacity has altered in any meaningful way." Thus Nufarm is seeking to continue an unjustified Anti-dumping Duty (ADD) on Chinese 2,4-D without attempting to study the Chinese production since 2008.

However, we also note that Nufarm contends that the Chinese producers have decided against cooperating with Australian Customs on this study. In my previous letter I reconfirmed the preparedness of both Hubei Sanonda (ChemChina Group) and Changzhou Wintafone (China's largest producer of 2,4-D acid) to cooperate with Australian Customs. Should Australian Customs experience difficulty in enlisting the assistance of these two companies, I urge you to ask for our assistance rather than adopt the course of action recommended by Nufarm. Nufarm is not interested in Chinese companies cooperating with Australian Customs because it already knows the outcome will be unfavourable towards its case.

The following statement, which appears on page 3 of Nufarm's application, suggests there are no substitutes for 2,4-D. "2,4-D acid is used as the active ingredient in the manufacture of phenoxy herbicides. The 2,4-D acid is dedicated to this purpose and has no other known use".

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This statement cannot be true because in the Administrative Appeal Tribunal Case No. 2008/2845 (Dow Agrosciences Australia Limited vs. Chief Executive Officer of Customs joined by Nufarm Australia Limited) dated 29th August 2012, as sworn evidence Nufarm argued that 2,4-D acid was a substitute for Trifluralin Technical (TT). The AAT agreed with Nufarm's contention that 2,4-D was a substitute for TT and vice versa. We note that ACCENSI has argued the same point in its submission to Australian Customs. A copy of the transcript is attached to this letter. Paragraph 80 of the transcript states. "The Tribunal finds that both TT and 2,4-D can be used for the same purpose."

We believe that either of the above factors provides sufficient grounds to terminate the ADD on Chinese 2,4-D acid. On the one hand, by its own admission, Nufarm has not conducted adequate research into the subject, notably the Chinese 2,4-D market. On the other hand, based on its own evidence to the AAT case, Nufarm has clearly misled Australian customs in its submission when it claims there are no substitutes for 2,4-D acid.

Yours sincerely,

Myles Stewart-Hesketh
Director

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2012] AATA 568

Division	**GENERAL ADMINISTRATIVE DIVISION**
File Number	**2008/3845**
Re	**Dow Agroscience Australia Limited**
	APPLICANT
And	**Chief Executive Officer of Customs**
	RESPONDENT
And	**Nufarm Australia Limited**
	JOINED PARTY

DECISION

Tribunal	**Deputy President R P Handley** **Emeritus Professor G Johnston AM**
Date	**29 August 2012**
Place	**Sydney**

Decision Summary **The decision under review is affirmed**.

.....[sgd].....

Deputy President R P Handley

CATCHWORDS

CUSTOMS – Remittal – Application for tariff concession order (TCO) – Application for TCO opposed by interested third party – core criteria for granting a TCO – 'substitutable goods' – definition of 'in the course of business' – Goods produced in Australia – Pre-emergent and post-emergent herbicide – Decision under review affirmed

LEGISLATION

Agricultural and Veterinary Chemicals (Administration) Act 1992 (Cth)

Customs Act 1901 (Cth)

CASES

Collector of Customs v Agfa-Gevaert Limited (1996) 186 CLR 389

Dow Agroscience Australia Ltd and Chief Executive Officer of Customs and Nufarm Australia Ltd (Party Joined) [2010] AATA 859

Johanson and Civil Aviation Safety Authority (2012) 127 ALD 195

Kenso Marketing (M) Sdn Bhd v Chief Executive Officer of Customs [2011] FCAFC 26

Nufarm Australia Ltd v Dow AgroSciences Australia Ltd (No 2) (2011) 123 ALD 21

Re Kenso Marketing Sdn Bhd and CEO Customs and Nufarm Australia Ltd [2010] AATA 445

Re Scholle Industries Pty Ltd and Comptroller General of Customs (1994) 37 ALD 303

Re Thirco Pty Ltd and Comptroller General of Customs (1995) 38 ALD 357

Riverwood Cartons Pty Ltd v Chief Executive Officer of Customs (1997) 77 FCR 493

Seguin Moreau, Australia v Chief Executive Officer of Customs (1977) 77 FCR 410

REASONS FOR DECISION

Deputy President R P Handley
Emeritus Professor G Johnston AM

1. Dow Agroscience Australia Limited (the Applicant) (Dow) has applied for the review of a decision of a delegate of the Chief Executive Officer of Customs (the Respondent) to refuse a tariff concession order (TCO) application lodged on behalf of Dow.

BACKGROUND

2. Dow originally lodged an application for a TCO on 12 October 2007, for goods described as:

> *PRECURSORS, HERBICIDE, having BOTH of the following:*
>
> *(a) NOT less than 96% trifluralin;*
>
> *(b) Nitrosamine NOT greater than 0.4 parts per million.*

The goods described in the TCO are commonly referred to as 'Trifluralin Technical' (TT).

3. On 13 December 2007, Nufarm Australia Limited (the Third Party Joined) (Nufarm) lodged an objection to the making of the TCO, claiming that Nufarm manufactured TT as well as a range of formulated Trifluralin products in Australia, and that its "formulated products are put to the same end use as the goods the subject of the TCO application" made by Dow.

4. On 14 March 2008, a delegate of the Respondent decided the TCO should not be made because Nufarm produced substitutable goods in Australia in the ordinary course of its business. Dow applied to the Respondent for a reconsideration of this decision but, on 10 July 2008, a delegate of the Respondent affirmed the decision.

5. On 19 August 2008, Dow applied to the Administrative Appeals Tribunal (the Tribunal) for a further review and Nufarm was joined as a party. On 3 November 2010, the

Tribunal set aside the Respondent's decision, and remitted the matter to the Respondent with the direction that the TCO sought by the Applicant should be granted. The Tribunal found that, for the purposes of the *Customs Act 1901* (Cth), Dow had met the 'core criteria' specified in the Act at the time the application for the TCO was lodged. The Tribunal was not satisfied that Nufarm produced substitutable goods for TT in Australia, and, consequently was not satisfied that the provisions of s 269D(1) of the *Customs Act* had been met: *Dow Agroscience Australia Ltd and Chief Executive Officer of Customs and Nufarm Australia Ltd (Party Joined)* [2010] AATA 859.

6. Nufarm successfully appealed the Tribunal's decision in the Federal Court: *Nufarm Australia Ltd v Dow AgroSciences Australia Ltd (No 2)* (2011) 123 ALD 21. The Federal Court (Robertson J) set aside the Tribunal's decision and remitted the matter to the Tribunal to be heard and decided again. His Honour found that the Tribunal made a number or errors of law, including that it erred in relation to its consideration of whether 2,4 D-Dichlorophenoxyacetic acid (2,4-D acid) produced by Nufarm was 'substitutable goods', as defined in s 269B(1) of the *Customs Act*.

THE LEGISLATION

7. The relevant legislation is set out by Robertson J in his decision at [6] to [10]:

> *6. 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.*
>
> *7. "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.

8. 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.

9. 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.*

10. 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.*

8. It should also be noted that s 269D(2) states:

> *(2) For the purposes of this Part, goods are to be taken to have been partly manufactured in Australia if at least one substantial process in the manufacture of the goods was carried out in Australia.*

However, there is no dispute with respect to Nufarm's manufacture of TT and 2,4-D acid that it satisfies this requirement.

9. Section 269FA states:

> *It is the responsibility of an applicant for a TCO to establish, to the satisfaction of the CEO, that, on the basis of:*
>
> > *(a) all information that the applicant has, or can reasonably be expected to have; and*
> >
> > *(b) all inquiries that the applicant has made, or can reasonably be expected to make;*
>
> *there are reasonable grounds for asserting that the application meets the core criteria.*

THE ISSUES

10. In the Federal Court decision in this matter at [49], Robertson J noted that in relying on Drummond J's judgment in *Seguin Moreau, Australia v Chief Executive Officer of Customs* (1977) 77 FCR 410, which did not support the Tribunal's conclusion, the "Tribunal was led into error in its construction of 'substitutable goods' as defined".

11. At [57], Robertson J said that in determining whether the claimed goods are 'substitutable goods':

> *57. A practical analysis would be:*
> *(i) what are the TCO goods?*
> *(ii) to what use or to what uses are they put or can they be put?*
> *(iii) what are the goods claimed to be substitutable?*
> *(iv) to what use or to what uses are they put or are they capable of being put?*
> *(v) are the uses in (ii) and (iv) or any of them corresponding uses?*

12. His Honour found such an analysis to be absent from the Tribunal's reasons, noting that while the Tribunal referred to Goldberg J's description of 'substitutable goods' in *Riverwood Cartons Pty Ltd v Chief Executive Officer of* Customs (1997) 77 FCR 493 at 497, it did not apply it.

13. In these remittal proceedings, given concessions made by the parties, it was unnecessary to address all the steps identified by Robertson J in determining whether the claimed

goods are 'substitutable goods'. The relevant TCO goods and the use of those goods are as stated in Dow's TCO application filed on 12 October 2007: "Precursors, Herbicide". The goods claimed to be substitutable are TT and 2,4-D acid. There is no dispute that TT produced by Nufarm has a corresponding use to the TCO goods but Dow disputes this in relation to 2,4-D acid. In relation to the TT produced by Nufarm, Dow also contends that the requirements of s 269D(1)(b) and s 269E(1) are not satisfied.

14. Thus, the issues to be decided by the Tribunal with regard to TT, are as follows:

(1) whether the TT produced by Nufarm in January 2007 satisfied the requirement in s 269D(1)(b) that 25% of the factory or works costs of the TT was represented by Australian content (labour, materials, and factory overhead expenses). The evidence relied on by Nufarm is that it produced a batch of 250kg drums of TT in January 2007 and that the Australian content of this batch exceeded 25%.

(2) whether in October 2007, Nufarm was prepared to accept an order to supply TT in the ordinary course of its business (s 269E(1)). Nufarm relies on paragraph (1) above in relation to the TT produced in January 2007.

15. The issue to be decided with regard to 2,4-D acid is whether 2,4-D acid has a corresponding use to the TCO goods, namely TT. There is no dispute that 2,4-D acid meets the 25% Australian content requirement and that it was produced by Nufarm in October 2007. The Tribunal refused to allow Dow, shortly before the hearing, without prior notice, to withdraw a concession it hadpreviously made, that 2,4-D acid was produced by Nufarm in the ordinary course of its business.

16. The Tribunal notes that s 269FA of the *Customs Act* imposes a responsibility on Dow to establish to the Respondent's satisfaction that there are reasonable grounds for asserting that its application meets the core criteria. Pursuant to s 269P(1) and s 269C, for Dow's application to succeed, the Respondent (and in these proceedings the Tribunal standing in the Respondent's shoes) must be satisfied that no substitutable goods were produced in Australia in the ordinary course of business. If the Respondent (or the Tribunal) is not so satisfied, then the TCO must be refused.

17. It is well-established that there is no onus of proof on any party to Tribunal proceedings: see for example, *Re Thirco Pty Ltd and Comptroller General of Customs* (1994) 35 ALD 665, at [26]. However, the TCO applicant, Dow, has a statutory responsibility pursuant to s 269FA. In this case, the joined party, Nufarm, as the interested party objecting to the grant of the TCO and asserting that it produces substitutable goods in Australia in the ordinary course of its business, is responsible for providing the Respondent (and the Tribunal) with evidence of this: see, for example, *Johanson and Civil Aviation Safety Authority* (2012) 127 ALD 195, at 203.

18. We note that in these remittal proceedings, the Tribunal had the benefit of both Robertson J's comments on the applicable law, and further evidence from the parties, particularly in relation to Nufarm's claim that it produces substitutable goods in the ordinary course of its business. The Tribunal was also assisted by a comprehensive 'Court Book' compiled by the Dow's lawyers.

THE EVIDENCE

19. The Tribunal was provided with statements/reports from the following witnesses, all of whom gave evidence at the hearing: for Dow – Andrew Storrie, Gavin Hall, and David Ferrier; for Nufarm – Eugene Shanahan, Andrew Wells, Maree Porter, and Lachlan McKinnon. A summary of their evidence appears below.

Andrew Storrie

20. Mr Storrie is the principal of Agronomo, a private consulting company that offers expert advice and assistance on, amongst other things, weed management and control. Mr Storrie provided statements dated 30 March 2012 and 30 April 2012. Mr Storrie said TriflurX (the brand name for a herbicide sold by Nufarm in which TT is the precursor and active ingredient), which needs to be placed near weeds before germination, is a pre-emergent herbicide that acts on weeds before they emerge from the soil. It kills the plant as it begins to emerge from the seed. TT cannot be used once the plant has germinated. By contrast, 2,4-D acid (Nufarm's brand name for this product is Estercide) is a post-

emergent herbicide, which has a "knockdown" effect and is used to kill weeds once they have developed to approximately the six or seven leaf stage.

21. Mr Storrie said the two types of herbicide are used to deal with different stages in the planting of crops, and the stage of development of the crop is one of the considerations to be taken into account when deciding what herbicide to use. Quite often, farmers will use TriflurX before germination and Estercide later in the life of the crop.

22. Mr Storrie said the Australian Pesticides and Veterinary Medicines Authority (APVMA) approves the labels for herbicides. Once approved, a label may remain registered for many years even if the product is no longer sold. He was referred to a label for one of Nufarm's herbicides, Tornado DF (a form of 2,4-D acid). Mr Storrie said Tornado DF can no longer be purchased in Australia and has not been available for some years. The label, which he criticised as being poorly written, states that Tornado DF can be applied to sugar cane pre-emergence or post-emergence. Mr Storrie said in the environment in which sugar cane is likely to be grown (higher rainfall and temperatures), the effectiveness of Tornado DF as a post-emergent herbicide would be low and no cane grower would use it as a pre-emergent herbicide under these conditions.

23. In cross-examination, Mr Storrie agreed that 2,4-D acid has some pre-emergent effect at high rates of application, and that while they operate using different mechanisms, the same end result – the killing of the weed – will result. He also agreed that 2,4-D acid could be applied with a pre-emergent herbicide at the same time with the overall objective of integrated weed management. The difference in timing between the application of pre and post-emergent herbicides could be as little as a week.

Gavin Hall

24. Mr Hall provided a statement dated 30 March 2012. He is a consultant on regulatory affairs concerning agricultural chemicals, and worked for the APVMA between 1994 and 2007. Mr Hall stated every aspect of the manufacture, supply and use of agricultural and veterinary chemicals in Australia is regulated by a National Registration Scheme (NRS) administered by the APVMA. The APVMA is established under the *Agricultural and*

Veterinary Chemicals (Administration) Act 1992 (Cth) which confers powers on the APVMA to, amongst other things, "approve active constituents, register chemical products (containing active constituents) and approve labels attached to chemical products". The active ingredient or constituent is the biologically operative part of an herbicide. Mr Hall stated that all formulated herbicides must be registered by the APVMA and the label for each product must be approved for use at the same time. The APVMA relies on data supplied by the applicant when approving a label. The registration for a product must be renewed annually but this is largely an administrative process.

David Ferrier

25. Mr Ferrier is an independent forensic chartered accountant who provided reports dated 27 April 2012 and 5 June 2012. He stated that in his letter of instruction from Dow's solicitors he was asked to prepare a report on the accounting methodology used by Maree Porter, Nufarm's Regional Financial Controller, in determining the factory or works costs of Nufarm products and in allocating labour and overhead costs for those products was correct and consistent with relevant accounting standards and conventions. In his first report, he summarised his assessment as follows (paragraph 8):

> *Based on my analysis of the documents listed above it would be that there are flaws in the methodology applied by Ms Porter in determining the costs associated with manufacture of the Nufarm Products, both in relation to the calculation of raw material costs and the allocation of labour and overheads.*

26. Mr Ferrier said he was unable to calculate the cost associated with the production of TT 250 (one drum of TT weighing 250 kgs) as at 12 October 2007. He said some cost items are, in his view, overstated to a greater or lesser degree, and with some items he was unable to determine the relevant cost. He noted that Ms Porter had, in the case of imported raw materials, used the Australian dollar value at the date of payment of the invoice. Mr Ferrier said based on the foreign exchange accounting standard (transcript 31 July 2012, p 116):

> *…it's appropriate to actually assess … the Australian dollar cost of the imported items based on the exchange rate at the date of delivery or the date of arrival into Australia, depending on the actual terms of the shipment into Australia.*

He noted that Nufarm has a US dollar account but said he was not aware of whether it had other hedging arrangements. Mr Ferrier said the effect of using the Australian dollar value at the date of paying the invoice would be to increase the cost of the imported materials by 1.0 to 1.5%, and therefore to decrease the Australian costs by a similar amount.

27. With regard to the Australian raw materials, Mr Ferrier said the cost of these appeared to be overstated by a small amount but he was unable to determine the amount. With regard to labour costs, Ms Porter relied totally on the figures supplied by Eugene Shanahan, Nufarm's Development and Technical Manager Chemistry, which lacked supporting documentation. Mr Ferrier noted that the use of a per kilogram costing for labour and overheads does not take into account that the specific gravity of some substances differs from others.

Maree Porter

28. Ms Porter, who is a chartered accountant, is Regional Financial Controller of Nufarm, a position she has held since January 2009. Ms Porter provided statements dated 2 April 2012 and 4 July 2012. She said she calculated the costs of the imported raw materials for Nufarm's products from invoices for the raw materials from late 2006/early 2007. She used the Australian dollar exchange rate at the day an invoice was paid because this was the economic cost to Nufarm and she was asked to use the actual cost to Nufarm in preparing her statement for these proceedings. She said because Nufarm sells its products in the US, it maintains a US dollar account and the US dollar invoices would have been paid from that account. To calculate the cost of the Australian raw materials, which are produced by Nufarm as a by-product of an unrelated manufacturing process, Ms Porter used invoices for the purchase of these products by Nufarm for its West Australian plant, representing the opportunity cost, the price Nufarm would have had to pay had it purchased these products, or at which Nufarm would have been able to sell these products to third parties.

29. Ms Porter said depreciation is allocated to all parts of Nufarm's plant. In relation to TT, in determining the percentage allocation for a particular depreciation item, she "tried to

identify the most appropriate driver behind an expense line" in allocating that expense. For example, the depreciation for buildings was according to the percentage of volume over total production, whereas the depreciation for motor vehicles was according to staff usage.

30. Ms Porter said she used kilograms as the unit of measurement for TT. She acknowledged that litres are used as the unit of measurement for some other products. She treated kilograms and litres as equal units of measurement because this is the common practice in the business, established before she commenced her employment with Nufarm, and for her it is best available information given that Nufarm probably has hundreds of products. She is not aware of the specific gravity of different products and, in cross-examination, acknowledged that if all products were converted to the same unit of measurement, different figures would result. (The Tribunal notes the difficulty of using the specific gravity of different products to convert all products to the same unit of measurement given that specific gravity varies according to the temperature of the product at the particular time. Moreover, according to Mr Shanahan's evidence, the specific gravity of particular batches of the same product, for example TT, varies from one batch to another. It appears to the Tribunal that across hundreds of products the conversion would be a difficult and time-consuming one.)

31. With regard to labour costs, Ms Porter said that when she commenced employment with Nufarm in 2009, there was no allocation of costs between different products. She therefore instituted a process for allocating costs so that the cost of labour could be understood at each stage of the production process. In 2010, Mr Shanahan developed a matrix to facilitate the costing for each product. Mr Shanahan determined the attribution of different employees' time to TT and to other products, identifying different employee groups according to the skills set of the particular employee. Ms Porter acknowledged that the matrix used did not exist in 2007 but said she considered this was the best methodology to use on the information available.

32. Ms Porter was asked about the cost of waste and the percentage attributed to TT. She said the percentage attributed to TT (for waste and water) was appropriate because the

technical staff advised her that "most of the waste comes from the sterification part of the plant or synthesising of the plant and the three areas that have that are 2,4-D, trifluralin and Esters". She calculated the percentage attributed based on the percentage volume of production of the three products – this was the best information available to her.

33. With regard to the cost attributable to insurance, Ms Porter said she did not know of the insurance consultant who prepared the valuation reports for the Laverton plant and what his expertise was. With regard to other overheads, Ms Porter said she used the actual expenses paid during the course of 2007 in her calculations.

Paul Shannon

34. Mr Shannon, who is a Chartered Accountant, was an audit partner at KPMG for 25 years until 31 December 2011. He was asked to provide an opinion in relation to accounting issues in this matter by Nufarm's solicitors. In doing so he referred to the Australian Accounting Standard AASB 102 Inventories. In his statement dated 29 March 2012, Mr Shannon said that with the exception of the marine insurance, customs duty and inwards freight costs of imported materials (about which he commented on the exchange rates employed by Ms Porter and her not addressing the issue of net realisable value), he agreed "that the accounting methodology adopted by Ms Porter in determining the cost of inventories complies with the provisions of AASB 102 – Inventories". He also agreed with Ms Porter's approach to the allocation of both labour and overheads.

35. With regard to the allocation of indirect costs, Mr Shannon said this needs to be appropriate in order to properly approximate the cost of a particular product. He said that, in the case of electricity, for example, a number of methods could be used: according to floor space used in production, according to the direct labour employed, or to the number of hours spent in making the product. Mr Shannon said that once a company has chosen a particular methodology, it should stick to it unless there is some specific reason for not doing so: "consistency is the most important thing in terms of determining profit and determining the value of stock". The allocation of overhead expenses based on volume of output is "a reasonably standard practice".

36. Mr Shannon said allocating overheads based, in the case of some products, on the kilograms of the product produced while, in the case of other products, on the litres of the product produced:

> *is not the best way of doing things, … but if it gets to the approximation of costs of that product then it can be used as an arithmetic allocation. It doesn't matter whether it's litres or whether it's kilograms. The question is, of course, does that approximate the cost, and is it a convenient way of approximating costs for the various products, which I assume flow through the factory in those proportions.*
>
> *… I think that the main thing about valuation of stock under the accounting standards is consistency, and once you choose a methodology then it should be continued year on year … unless there is evidence to suggest that this allocation does not approximate costs …*

37. Mr Shannon said that if using a different methodology would only make a small difference to the outcome, you would not change the methodology: "The whole accounting standards talks about convenience and approximating cost, and if you can do it in the most convenient way, you would do it that way". If some products are sold in litres and others in kilograms, "it's a logical – it's not really an accounting thing, it's just a logical, arithmetic allocation of cost, and what's coming out of that factory, you would use those units".

38. Mr Shannon was asked about one litre of product equating to between 1.1 and 1.4 kilograms of the same product and whether this makes a difference to the reasonableness of the approximation of costs. Mr Shannon answered:

> *I'm not sure that the factor of conversion makes any difference from – because all we're looking at, here – it's an arithmetic allocation of otherwise unallocatable costs … from an accounting perspective or an auditing perspective, as long as the end result approximates cost then use of it, regardless of factor, would be reasonable.*

39. Mr Shannon said allocating overheads in the same proportion as direct labour hours is one method that could be used if it fits the particular situation. Moreover, different methodologies can be used for allocating different costs. It is a matter of what achieves the best result from an accounting perspective and being consistent in the use of that methodology from year to year to ensure there is no distortion of profit.

40. In answer to a question, Mr Shannon agreed that one of the main purposes of auditing is to ensure the profit and loss account of a company is accurate, and consistency in the methodology employed from year to year is very important.

Eugene Shanahan

41. Mr Shanahan, who is the Development and Technical Manager Chemistry at Nufarm's Laverton North manufacturing site, provided a statement dated 2 April 2012. He has worked for Nufarm for 25 years. He said the Laverton North site comprises about 40 acres of which 24 Acres comprise factory operations. Nufarm has produced TT at its Laverton plant since 1984. Most of this is used in the manufacture of formulated trifluralin products, but Nufarm also produces TT in 250 kg drums to customers' orders, as it did in January 2007.

42. Mr Shanahan stated that TT is manufactured and packed in liquid form. Because TT is a solid at room temperature with a melting point of approximately 47C, the packing equipment is heated and thermally insulated to ensure the temperature of the TT remains above 50C. Once the 250 kg drums are filled with liquid TT, they are allowed to cool and, when cool, manually sealed. The production of TT involves a two-step synthesis process over a single facility.

43. Mr Shanahan said 2,4-D acid is produced in solid form and recorded in kgs. It is a flake and so takes up more space relative to TT. Its production involves a synthesis strain with about five stages over multiple buildings. Ester is a liquid and Glyphosate is a solid. They are all used in herbicide formulations, both general and speciality, of which, in total, there are about 100, in liquid form and recorded in litres. They do not have a common density, varying from a specific gravity of about 0.95 to about 1.36. Not all formulations are produced at the same temperature, and the ambient temperature of the day will determine the temperature of the operation. Mr Shanahan said the specific density of formulations varies from time to time and there are over 300 changes in formulation over the course of a year. For example, the active ingredient content might change from 400 to 500 grams per litre. The TT solvent in TriflurX, which is a liquid

herbicide, varies from 499 to 557 grams per litre. Each one of those different formulations would have a different specific density.

44. Mr Shanahan said he has been doing labour or expense analysis for the Laverton site in his current role since 1999 and is very familiar with staffing levels at the plant, including the TT plant. Employees move from one plant to another depending on their skill set and the demands of the operation. The TT manufacturing plant runs for 24 hours per day from October until the end of April every year and is operated by single employees on a shift basis. Mr Shanahan said there are no specific records of the hours spent by a particular employee at a particular location on the site. In allocating of labour costs, he relies on his experience and his knowledge of particular employees' skills sets. Where he needs more information, he requests this from the relevant manager.

45. Mr Shanahan said that when Ms Porter commenced employment with Nufarm, she asked the management team to better record the deployment of employees on the site in order to get a better estimate of the costs attributable to particular products. The request was made in about September 2010 and he supplied figures, after a number of iterations, in May 2011. The methodology developed at that time continues to be used. When asked to do so, Mr Shanahan employed the same methodology in estimating labour costs across different products for 2006/2007 with the assistance of "a staff list from payroll" . He also "spoke to, probably, three or four supervisors and superintendents who had an intimate knowledge". After submitting a spread sheet for 2006/2007 showing the deployment of labour across different products, he subsequently made some changes to better reflect the deployment of staff having reviewed the spread sheet for 2009/2010. This resulted in him reducing the labour costs allocated for TT for 2006/2007.

46. Mr Shanahan was asked about packing TT in 250 kg drums. He said two staff are required at the commencement of packing because the TT is hot, having been stored at above 50C, and the safety of the operators, one of whom is fully suited up in PPE (personal protective equipment: face shield, gloves etc), is extremely important. The packing operation is also overseen by a supervisor.

47. In cross-examination, Mr Shanahan said that TT and TriflurX are produced in batches in a single facility. The facility, which measures about 50m by 50m and is up to four storeys high, has a roof over the top but is not enclosed. It has "multiple tanks with piping connections and scrubbing facilities".

48. Mr Shanahan said he had experience with the Laverton North plant having a shortfall in production of TT and needing to import TT to keep up with its formulation production. The shortfall might have occurred because of a raw material shortage. He could not recall why Nufarm would have imported TT in October 2007. He acknowledged that it might have been cheaper than that produced locally.

Lachlan McKinnon

49. Mr McKinnon is the General Manager of Nufarm. He provided a statement dated 31 July 2012 and gave evidence by video conference from Melbourne. Mr McKinnon said he has held the position of general manager since October 2002 and is "responsible for the day to day management of Nufarm's operations, including the sales, marketing and manufacturing activities of the company". He has worked for the Nufarm group of companies since March 1990. Nufarm Australia Ltd is a subsidiary of the Nufarm Group as is Nufarm Asia.

50. Mr McKinnon stated that Nufarm's sale of TT to customers is undertaken by its Third Party Sales group which is responsible for negotiating and arranging sales of active ingredients and finished products to other crop protection companies or for export. Such 'third party sales' are distinct and separate from the sale and supply of finished products to distributors (referred to as 'brand sales') who on-sell the goods to farmers and other end use users. Nufarm has sold products to Dow on a third party basis but Mr McKinnon said he was not aware of whether Dow had sought to purchase TT from Nufarm in 2007 in 250 kg drums. Had Dow sought to purchase TT in this form from Nufarm, Nufarm "would have discussed a commercial opportunity like that with them and been prepared to sell to them". Factors that would have influenced this would have been the quantity, price, and timing involved.

51. Mr McKinnon said Nufarm's product catalogues do not include products for sale to third parties. Nufarm does not list third party products in any catalogues.. However, those customers interested in third party sales would be aware of what Nufarm is prepared to sell.

52. Mr McKinnon was asked about the sale of 32 drums of TT to Nufarm Asia in 2007. He said the majority of sales, even to related companies, are typically at arm's length. He has no knowledge that payment was not received in the sum on the invoice. Nufarm does sell its products to other Nufarm companies outside Australia and does render invoices which would be paid.

53. Mr McKinnon was also asked about Nufarm's purchases of TT from a Chinese company between November 2006 and March 2008 at a cost apparently less than the cost to Nufarm of producing TT. He said the invoices did not include other costs involved in the importation such as insurance which should be added before one has a true equivalent cost. Moreover, Nufarm has a partner relationship with this company and buying a small quantity of TT may be part of that overall relationship, and the invoice may not, therefore, "be actually true or relevant to the real price".

Andrew Wells

54. Mr Wells, who is the Research and Development Manager of Nufarm, provided a statement dated 2 April 2012. He has worked for Nufarm for 23 years and was appointed to his present position in 2002. In his statement, Mr Wells said TriflurX (in which TT is the active ingredient) and Estercide (in which 2,4-D acid is the active ingredient) can be used, to the extents permitted by their labels, to control the same weeds in the same crops. While he acknowledged that TriflurX is a pre-emergent herbicide and Estercide is a post-emergent herbicide and that they will generally have different effects, he said some post-emergent 2,4-D herbicides such as Tornado DF can have pre-emergent effects. However, while Tornado DF remains registered with the APVMA, it was last sold in 2001/2002 and is currently under review by the APVMA as part of its review of 2,4-D. He also agreed that in 2007, the use of Tornado DF would not have accorded with best practice.

55. Mr Wells said he is personally involved in drafting labels for Nufarm's products for approval by the APVMA. He said integrated weed management principles indicate that TriflurX and Estercide could both be applied at the pre-sowing stage if a farmer has a serious weed problem. Alternatively, TriflurX could be applied pre-sowing and Estercide later after the crop has emerged. Either method will reduce the weed seedbank. It is better to use both over time to avoid weeds developing resistance to one herbicide. However, which herbicide is used by a farmer will depend on conditions, for example, the sowing time, the soil conditions and rainfall.

DISCUSSION OF THE ISSUES

Did the TT produced by Nufarm meet the 25% Australian content requirement?

56. As stated above, the first issue in relation to TT is whether the TT produced by Nufarm in January 2007 satisfied the requirement in s 269D(1)(b) of the *Customs Act* that "not less than ¼ of the factory or works costs" of the TT was represented by Australian content. Thus, as the Respondent pointed out, the issue is not whether Ms Porter's assessment of the percentage Australian content is correct. Rather, it is whether the Tribunal is satisfied that the Australian content is not less than 25%. The evidence relied on by Nufarm is that it produced a batch of 250kg drums of TT in January 2007 and that the Australian content of this batch exceeded 25%.

57. The words 'factory or works costs' are to be given their ordinary meaning, that is "all actual costs incurred in the transformation of material into finished goods, including packaging and labour costs": *Re Kenso Marketing Sdn Bhd and CEO Customs and Nufarm Australia Ltd* [2010] AATA 445, at [26]) which followed *Re Scholle Industries Pty Ltd and Comptroller General of Customs* (1994) 37 ALD 303, at 306); approved by the Full Federal Court in *Kenso Marketing (M) Sdn Bhd v Chief Executive Officer of Customs* [2011] FCAFC 26, at [50]. Determining the factory or works costs does not require the application of accounting standards although we accept that reference to such standards may assist the Tribunal in its assessment.

58. The Tribunal heard evidence from Ms Porter about the Australian content of the TT it produced in January 2007, being close in time to Dow's TCO application. Ms Porter calculated that the Australian content represented a total of more than 25% of the factory cost of producing TT. This comprised Australian materials, labour and overheads (depreciation, other manufacturing overheads, manufacturing labour and packing labour). The imported materials comprised the balance of the total cost.

59. The Applicant submits that Ms Porter's analysis and conclusions as to the costs of materials, labour and factory overheads are unreliable, pointing to her lack of independence, her reliance on others for information from which she drew her conclusions (for example, on Mr Shanahan's calculation of labour time attributable to the production of TT which the Applicant submitted was "arbitrary"), to the lack of supporting documentation, and to some minor initial errors that were subsequently corrected. With regard to the cost of the imported materials, the Applicant criticised Ms Porter's use of the exchange rate at the time of payment which Mr Ferrier said was contrary to general accounting standards. The Applicant also criticised Ms Porter's calculation of attributable overheads noting the units of measurement were in some cases kilograms and in others litres and that her allocation of attributable percentages were arbitrary or relied on unsubstantiated information.

60. The Tribunal notes that it was not suggested that Ms Porter was an independent witness. Indeed, someone in Ms Porter's position of Regional Financial Controller, with knowledge of Nufarm's operations and with access to those who could supply relevant information, was needed to calculate the factory costs for TT. The impression formed by the Tribunal was that Ms Porter was a credible witness who conscientiously performed her task to the best of her ability. It is unreasonable to suggest that someone in her position should not rely on information provided to her by others for the purpose of this exercise. Given the lack of documentation available to her for the financial year 2007 on which to allocate costs attributable, for example, to labour and overheads, Ms Porter appears to us to have taken a reasonable approach in calculating the relevant costs. While Mr Ferrier's evidence was critical of Ms Porter's approach in some respects, Mr Shannon's evidence was generally supportive of the approach she adopted. The Tribunal

formed the view that Mr Ferrier took a more accounting standards focused approach and was not focused on the need to estimate the actual costs involved in the production of TT, about which Mr Shannon appeared to adopt a more practical focus.

61. With regard to the cost of materials that are the by-product of other Nufarm manufacturing, Ms Porter was criticised for her use of invoices for the supply of such raw materials from around the relevant time. However, the Tribunal notes that Mr Ferrier conceded that the approach adopted by Ms Porter "was one way to do it" .

62. With regard to imported materials, we note that in calculating such costs Ms Porter was not bound by accounting standards. Her explanation that she chose to use the applicable exchange rate at the date of payment of the invoice because this was the economic cost to Nufarm, seems logical and reasonable to us given that her brief was to calculate the actual cost of the imported materials.

63. With regard to the cost of labour, we accept Ms Porter's and Mr Shanahan's evidence that there was no attribution of labour costs to particular products in 2007. In the absence of such records, the Tribunal is satisfied from Mr Shanahan's explanation of the approach he adopted in estimating the labour attributable to TT, that his deployment figures are a reasonably reliable approximation. We are satisfied that these deployment figures, in conjunction with the relevant payroll information from that time, provide a reasonably reliable estimate of the labour costs attributable to TT.

64. Finally, with regard to overheads, and criticism of Ms Porter for not distinguishing between the two units of measurement – kilograms and litres – in her allocation, the Tribunal notes Mr Shannon's evidence that it does not matter which of the units are used in the allocation as long as it permits a convenient way of approximating costs for the various products. He emphasised the importance of consistency in the methodology used from year to year. The Tribunal also notes the practical difficulty of using one or other unit of measurement where, according to Mr Shanahan, there are hundreds of formulations of particular products during the course of a year and that the specific gravity of a product varies with temperature. As a result, some units might be more uniformly measured in kilograms rather than litres. Ms Porter chose to use the units in

which the products were produced: kilograms for solids such as TT and 2,4-D acid and litres for liquids. There was no evidence before the Tribunal that using a different approach would have made a substantial difference to the apportioning of overheads to the various Nufarm products. The Tribunal was conscious of the difficulties in apportioning of overheads as illustrated in the production of ice and water for human consumption: in this case identical chemicals are produced and sold as solid ice in kilograms and liquid water in litres, and the production overheads differ considerably.

65. In relation to the percentage allocation for the various overheads, the Tribunal found Ms Porter's explanation of how she arrived at the percentage allocation of overheads for TT – by reference to the "common driver behind an expense line" – to be a reasonable and practical way to do this.

66. In conclusion, the Tribunal is satisfied that Ms Porter's calculation of the total factory cost of TT in 2007 is a reasonably reliable one and, therefore, that "not less than ¼ of the factory or works costs" of the TT was represented by Australian content.

Was Nufarm prepared to accept an order to supply TT in the ordinary course of its business?

67. The second issue in relation to TT is whether in October 2007, Nufarm was prepared to accept an order to supply TT in the ordinary course of its business (s 269E(1)). We note, as Deputy President Forgie said in her decision in *Re General Merchandise and CEO Customs* (2009) 114 ALD 289 at [31]:

> *31. The test in s 269E(1) as it now appears does not require that the person is prepared to accept orders for the supply of the relevant goods "in the normal course of business" or even "in the ordinary course of business". All that is required is that the person is prepared to "accept an order to supply" goods that meet one or other of the three descriptions in s 269E(1)(a), (b) or (c).*

68. Nufarm relies on paragraph (a) in relation to the TT produced in January 2007, the invoice for which it has produced. The Tribunal found Mr McKinnon's evidence to be persuasive on this issue. He explained that Nufarm's Third Party Sales group is responsible for negotiating and arranging sales of active ingredients and finished products to other crop protection companies or for export. This part of Nufarm's

business is separate and distinct from its 'branded sales', for which it produces catalogues, involving the sale and supply of finished goods to distributors. Mr McKinnon said Nufarm has in the past sold products to Dow on a third party sales basis but he was not aware of whether Dow had sought to purchase TT from Nufarm. There was no evidence before the Tribunal that Dow had sought to establish whether or not Nufarm would supply them with TT before lodging their application for a TCO in October 2007.

69. With regard to the invoice for the sale of TT to Nufarm Asia in January 2007, while there is no requirement in s 269E that there be a sale, the Tribunal notes Mr McKinnon's evidence that while Nufarm Asia is, like Nufarm Australia Ltd, a subsidiary of the Nufarm group of companies, such sales are typically at arm's length.

70. Mr Shanahan's evidence about the process of filling the 250 kg drums with TT and the process of solidification of the TT as it cools and then the sealing of the drum, indicates that Nufarm has both the equipment, the know-how and the expertise to fulfil an order for TT. Thus, the Tribunal is satisfied that Nufarm was both willing to accept an order for TT in October 2007 and able to fulfil such an order in the ordinary course of its business.

71. The consequence of the Tribunal's findings above in relation to TT is that, in relation to s 269C of the *Customs Act*, we are not satisfied that the core criteria were met by Dow's TCO application on 12 October 2007 because substitutable goods, namely TT, were produced by Nufarm in Australia in the ordinary course of its business. The Respondent's decision to refuse Dow's application for a TCO in respect of TT must therefore be affirmed. Notwithstanding our decision with regard to TT, we will, for the sake of completeness, consider the issue raised in relation to 2,4-D acid.

Does 2,4-D acid have a corresponding use to the TCO goods?

72. The issue in relation to 2,4-D acid is whether, pursuant to the definition of 'substitutable goods' in s 269B(1) of the *Customs Act*, 2,4-D acid is put to, or is capable of being put to a use that corresponds with a use to which the TCO goods, namely TT, can be put. In

CEO of Customs v Toyota Material Handling Australia Pty Ltd [2012] FCAFC 78, the Full Federal Court, at [10], said that the definition of substitutable goods required, in that case, "not only a consideration of the actual uses to which the TCO goods were put but also, importantly, the uses to which they could reasonably be put". In *Riverwood Cartons v CEO of Custom*s (1997) 77 FCR 493, at 497, Goldberg J 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 the 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.*

73. In *GE Plastics (Australia) Pty Ltd and CEO Customs* [1999] AATA 88, at p 18, the Tribunal noted that the use of the word 'can' in the definition of substitutable goods "has the effect of including possible or potential uses … not in some abstract or theoretical sense, but in the sense, of being a real possibility".

74. In the Federal Court decision in this matter at [49], Robertson J noted that in relying on Drummond J's judgment in *Seguin Moreau, Australia v Chief Executive Officer of Customs* (1977) 77 FCR 410, which did not support the Tribunal's conclusion, the "Tribunal was led into error in its construction of 'substitutable goods' as defined". His Honour said, at [50 – 51]:

> *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] HCA 36; (1996) 186 CLR 389 at 398-402) is not science but trade and commerce.*

75. The reference to the 'relevant register' by the High Court in the *Agfa-Gevaert* decision is to the context in which the statutory provision applies. In this instance, as Robertson J said, the context is that in which the relevant provisions of the *Customs Act* apply, namely trade and commerce.

76. More particularly in relation to this case, His Honour said, at [60]:

> *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.*

77. TT and 2,4-D acid are precursors in the manufacture of, respectively, the formulated herbicides TriflurX and Estercide 680 produced by Nufarm and approved for use by the APVMA in accordance with their approved labels. TriflurX and Estercide 680 are broken down within the plant to yield the active ingredients, TT and 2,4-D acid, that kill the plant. The purpose of the formulation is to facilitate the delivery of the active ingredients to the relevant parts of the plant.

78. There is no dispute that TriflurX is a pre-emergent herbicide which kills the plant as it begins to emerge from the seed. By contrast, Estercide 680 is a post-emergent herbicide which is used to kill the plant after it emerges from the seed and, usually, once it has reached, according to Mr Storrie, the six or seven leaf stage. However, in both cases, the herbicide is used to kill weeds. According to the labels for the two herbicides, they can both be used to kill weeds in a variety of similar crops, for example cereals and grain legumes. Mr Storrie's evidence is that farmers will often use TriflurX before the crop germinates and Estercide 680 later, after the crop has germinated. TriflurX cannot be used after the crop has germinated because it will kill the plant.

79. Mr Wells gave evidence that rather than using the two herbicides sequentially, integrated weed management principles suggest that both TriflurX and Estercide 680 could both be applied at the pre-sowing stage if a farmer has a serious weed problem. However, at what stage a particular herbicide is used will depend on conditions such as the sowing time, state of the soil and rainfall. He said it is important for a farmer to use different herbicides to avoid weeds developing resistance to a particular herbicide.

80. The Tribunal finds that both TT and 2,4-D acid can be used for the same purpose – to kill weeds growing in a variety of similar crops. The fact that one is a pre-emergent

herbicide and operates in a different manner to the other post-emergent herbicide does not establish, as Robertson J stated, that the goods are not substitutable. The question is whether the 2,4-D acid can be put to a use that corresponds to a use to which TT can be put, bearing in mind that the context in which the relevant provisions of the *Customs Act* operate is trade and commerce. We are satisfied that the answer to that question must be 'yes' – that 2,4-D acid does have a corresponding use to TT. In terms of the definition in s 269C, we are satisfied that 2,4-D acid comprises 'substitutable goods' for the TT which is the subject of the TCO application.

81. Having so concluded, the Tribunal is not satisfied, pursuant to s 269P(1), that Dow's TCO application meets the core criteria.

82. Nufarm also sought to establish that a particular formulation of 2,4-D acid, with the brand name Tornado DF, could be used for the pre-emergent control of the same weeds in sugarcane that can be controlled by TriflurX. We note that while Mr Wells' evidence is that Tornado DF was last sold in 2001/2002, it remains APVMA approved. However, Mr Wells acknowledged that its use would not accord with best practice. Mr Storrie, while agreeing that 2,4-D acid has some pre-emergent effect at high rates of application, for example to kill some weeds in sugar cane, said its effectiveness would be low and that in his opinion, in the environment in which sugar cane is grown, no cane grower would use it under such conditions.

83. While, given our other findings, it is unnecessary for the Tribunal to make a conclusive finding about this pre-emergent use, our view is that in the context of trade and commerce, as at 12 October 2007, this potential use for Tornado DF was not a real possibility. We therefore reject Nufarm's contention that Tornado DF had a corresponding pre-emergent use to that of TriflurX.

DECISION

84. The application under review is affirmed.

I certify that the preceding 84 (eighty four) paragraphs are a true copy of the reasons for the decision herein of Deputy President R P Handley and Emeritus Professor G Johnston.

.....[sgd].....

Associate

Dated 29 August 2012

Dates of hearing	**30 July - 3 August 2012**
Date final submissions received	**3 August 2012**
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Solicitors for the Applicant	**D Boyall, FAL Lawyers**
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