Federal Court of Australia

Chief Executive Officer of Customs v AMI Toyota Ltd [2000] FCA 1343 (19 September 2000)

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FEDERAL COURT OF AUSTRALIA

Chief Executive Officer of Customs v AMI Toyota Ltd [2000] FCA 1343

CUSTOMS - customs value of goods imported into Australia - one of the components of the purchase price payable by the purchaser to the vendor was an amount paid for the right of the purchaser to be reimbursed by the vendor for the cost of the work carried out in Australia pursuant to warranties given by the purchaser to customers in respect of the vehicles. - whether the component is a payment made in relation to the goods - whether the component was a value unrelated matter as defined in s 154(1) - whether the component was a cost, charge or expense in relation to activities undertaken by the purchaser on the purchaser's own account relating to warranties in relation to the goods - whether the alleged failure of AAT to address a central question raised by the material involved a question of law

Customs Act 1901 (Cth) s 154(1), 159, 161(1) and 161(2)

Administrative Appeals Tribunal Act 1975 (Cth) s 44

LNC (Wholesale) Pty Ltd v Collector of Customs (1988) 17 FCR 154 - applied

Hayes v Federal Commissioner of Taxation (1956) CLR 47 - cited

Hatfield v Health Insurance Commission (1987) 15 FCR 487 - considered

Burswood Management Ltd v Attorney-General (Cth) (1990) 23 FCR 144 - cited

Minister for Immigration and Multicultural Affairs v Singh [2000] FCA 845 - cited

Commonwealth Quarries (Footscray) Proprietary Limited v The Federal Commissioner of Taxation *[1938] HCA 13;* (1938) 59 CLR 111 - cited

E.M.I. (Australia) Limited v Commissioner of Taxation of the Commonwealth (1971) 45 ALJR 349 - cited

Bushell v Repatriation Commission *[1992] HCA 47;* (1992) 175 CLR 408 - cited

Noble v Repatriation Commission (Beaumont, Branson and Merkel J, unreported, 3 November 1997) - cited

Ex parte Hebburn; Re Kearsley Shire Council (1947) 47 SR (NSW) 416 - cited

Sinclar v Mining Warden at Maryborough [1975] HCA 17; (1975) 132 CLR 473 - cited

Craig v South Australia *[1995] HCA 58;* (1995) 184 CLR 163 - cited

CHIEF EXECUTIVE OFFICER OF CUSTOMS v AMI TOYOTA LTD AND ORS

V 138 of 2000

JUDGE: HILL, NORTH AND MERKEL JJ

PLACE: MELBOURNE

DATE: 19 SEPTEMBER 2000

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	V 138 OF 2000

BETWEEN:	CHIEF EXECUTIVE OFFICER OF CUSTOMS APPELLANT
AND:	AMI TOYOTA LTD (ACN 004 300 912) FIRST RESPONDENT TOYOTA MOTOR CORPORATION AUSTRALIA LTD (ACN 004 384 338) SECOND RESPONDENT TOYOTA MOTOR SALES AUSTRALIA LTD (ACN 009 686 097) THIRD RESPONDENT
JUDGE:	HILL, NORTH AND MERKEL JJ
DATE OF ORDER:	19 SEPTEMBER 2000
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. Save that the order of Heerey J that:

> *"The case be remitted to the Administrative Appeals Tribunal with directions that the decisions of the respondent under review be set aside and that the customs value of the vehicles in question be recalculated by the respondent on the basis that the average warranty cost in relation to each vehicle be not included."*

be set aside and in lieu thereof it be ordered that the case be remitted to the Administrative Appeals Tribunal to be determined in accordance with law and with these reasons for judgment, the appeal otherwise be dismissed.

2. The appellant pay the respondents' taxed costs of and incidental to the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY V 138 OF 2000

BETWEEN: CHIEF EXECUTIVE OFFICER OF CUSTOMS

APPELLANT

AND: AMI TOYOTA LTD

(ACN 004 300 912)

FIRST RESPONDENT

TOYOTA MOTOR CORPORATION AUSTRALIA LTD

(ACN 004 384 338)

SECOND RESPONDENT

TOYOTA MOTOR SALES AUSTRALIA LTD

(ACN 009 686 097)

THIRD RESPONDENT

JUDGE: HILL, NORTH AND MERKEL JJ

DATE: 19 SEPTEMBER 2000

PLACE: MELBOURNE

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The present appeal is concerned with the customs value of Toyota vehicles imported into Australia from Japan. Under contracts of sale, pursuant to which Toyota vehicles are purchased and imported into Australia, the respondent purchasers (compendiously referred to as "Toyota Australia") are reimbursed by the vendor, which is the parent company of the Toyota group in Japan ("Toyota Japan") for the cost of the work carried out in Australia pursuant to warranties given by Toyota Australia to purchasers of the vehicles. The question arising in the appeal is whether the customs value of the imported vehicles, calculated in accordance with the *Customs Act 1901* (Cth) ("the Act"), includes the component of the price which relates to that reimbursed amount.

2 The Chief Executive Officer of Customs ("the appellant") decided that the amount paid under the contracts of sale in respect of the warranty component ("the average warranty cost") is to be included as part of the customs value attributed to each vehicle sold by Toyota Japan to Toyota Australia. Toyota Australia appealed under the provisions of s 273GA(2) of the Act against the decisions. Toyota Australia and the appellant presented a Statement of Agreed Facts (together with agreed documentation) to the Administrative Appeals Tribunal ("the AAT") to enable it to determine the appeal. The AAT affirmed the decisions under review. Toyota Australia then appealed against the decision of the AAT to a single Judge of the Court under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), claiming that the appeal involved a question of law.

3 The appeal was allowed, the decisions under review were set aside and the case was remitted to the AAT. Directions were given that the decisions of the appellant under review be set aside, and the customs value of the vehicles in question be recalculated by the appellant on the basis that the average warranty cost in relation to each vehicle not be included. The appellant has appealed to a Full Court against the decision of the primary judge, claiming that his Honour erred in law in allowing the appeal.

The facts

4 Toyota Australia purchases, and then imports, Toyota vehicles from Toyota Japan. The terms of the individual contracts of sale for the vehicles are established in accordance with the provisions of importer agreements entered into between Toyota Australia and Toyota Japan. Although the terms of those agreements have varied from time to time, it was common ground that the variations are not relevant for the purposes of determining the issues arising on the present appeal.

5 Under the agreements, Toyota Japan conferred on Toyota Australia the exclusive right to import Toyota vehicles into the Australian market. Each sales contract becomes effective upon Toyota Japan notifying Toyota Australia of the acceptance of orders placed by Toyota Australia for the purchase of vehicles. The price of the vehicles under each sales contract is to be set by Toyota Japan in accordance with its then current price notification and is first set out in the invoice of Toyota Japan for the vehicle. Ownership and possession of the vehicles the subject of each individual sales contract vests in Toyota Australia upon Toyota Japan delivering a bill of lading for the vehicles. After importation of the goods, Toyota Australia sells the vehicles through distributors or dealers to

consumers.

6 Under the importer agreements, each consumer is to be given a warranty by Toyota Japan and Toyota Australia in respect of the vehicle purchased. The warranty covers the cost of warranty repairs, as defined in the relevant **Toyota Warranty** and Procedures Manual ("the **Toyota Warranty** policy"). Although under the **Toyota Warranty** policy Toyota Japan and Toyota Australia appear to be jointly and severally liable to consumers for warranty repairs, ultimately, Toyota Japan is to bear the cost of the repairs. This is because under the contractual arrangements Toyota Australia is reimbursed by Toyota Japan for the cost of work done pursuant to such warranties. In practice, owners of Toyota vehicles bring their vehicles in for warranty repairs to Toyota dealers in Australia. The dealers repair the vehicles and seek reimbursement for their costs in performing the repairs from Toyota Australia. Toyota Australia then seeks reimbursement from Toyota Japan. The reimbursement only relates to warranty repairs, as defined in the **Toyota Warranty** policy.

7 It was common ground between the parties that one of the components of the purchase price determined and set by Toyota Japan in respect of the vehicles sold to Toyota Australia was the average warranty cost, and the matter has been contested by them on that basis. The AAT explained the manner in which the average warranty cost component was calculated as follows:

> *"In practice the warranty costs are represented by the average cost to Toyota Japan per vehicle type, calculated against the actual warranty costs incurred in a preceding six month period for that vehicle type..."*

8 Although the average warranty cost was a component of the price it was not calculated or payable under the individual sales contract as a separate or severable part of the price. The AAT found that the first time any separate cost allocation was made for the average warranty cost was when the invoice was prepared in respect of the goods. The AAT stated:

> *"The identification in the invoice of an amount attributable to warranty costs is simply the identification of one of the elements constituted in the price arrived at between Toyota Australia and Toyota Japan."*

9 The issue on the appeal is whether the average warranty cost is to be included or excluded from the determination of customs value for the purposes of the Act.

The Act

10 For present purposes it is sufficient to set out the relevant statutory provisions as summarised by the primary judge.

11 Duties of customs are imposed on goods imported into Australia: *Customs Tariff Act 1987* (Cth) s 21, *Customs Tariff Act 1995* (Cth) s 15. A customs regime necessarily requires rules for fixing the value of goods subject to duty. The rules fix the figure, generally referred to as the customs value of the goods, to which the relevant rate of customs duty is to be applied to determine the customs duty payable. Such rules are contained in Division 2 of Part VIII of the *Customs Act 1901* ("the Act"), which is headed "Valuation of imported goods". The provisions relevant to the present matter are as follows (emphasis added).

12 Section 159 of the Act provides:

> *"(1) Unless the contrary intention appears in this Act or in another Act, the value of imported goods for the purposes of an Act imposing duty is their customs value and the Collector shall determine that customs value in accordance with this section.*
>
> *(2) Where a Collector can determine the transaction value of imported goods, their customs value is their transaction value."*

13 It is common ground that this is a case in which the "transaction value" of the goods could be determined.

14 Section 161(1) of the Act provides:

> *"161(1) The transaction value of imported goods is an amount equal to the sum of their adjusted price in their import sales transaction and of their price related costs to the extent that those costs have not been taken into account in determining the price of the goods."*

15 The expression "adjusted price" is defined in s. 161(2) as follows:

> *"(2) In this section:*
>
> **adjusted price**, in relation to imported goods, means the price of the goods determined by a Collector who deducts from the amount that, but for this subsection, would be the amount of that price, such amounts as the Collector considers necessary to take account of the following matters:
>
> (a) deductible financing costs in relation to the goods;
>
> (b) any costs that the Collector is satisfied:
>
> (i) are payable for the assembly, erection, construction or maintenance of, or any

technical assistance in respect of, the goods;

(ii) are incurred after importation of the goods into Australia; and

(ii) are capable of being accurately quantified by reference to the import sales transaction relating to the goods;

(c) Australian inland freight and Australian inland insurance in relation to the goods;

(d) deductible administrative costs in relation to the goods;

(e) overseas freight and overseas insurance in relation to the goods."

16 "Import sales transaction" is defined in s. 154(1) as follows:

*"`**import sales transaction**', in relation to imported goods, means:*

(a) where there was one, and only one, contract of sale for the importation of the goods into Australia entered into before they became subject to Customs control and it was also a contract for their exportation from a foreign country - that contract;

(b) ...

(c) ...

and includes:

(d) ... and

(e) any other contract, agreement or arrangement relating to the contract of sale referred to in paragraph (a), (b) or (c) that a Collector determines is so closely connected with that contract and to the goods the subject of that contract that together they form a single transaction."

17 Section 154(1) defines `price', unless the contrary intention appears, as follows:

*"`**price**', in relation to goods the subject of a contract of sale, means an amount determined by a Collector, after disregarding value unrelated matters in relation to those goods, to be the sum of:*

(a) all payments that have been made, or are to be made, directly or indirectly, in

relation to such goods, by or on behalf of the purchaser:

(i) to the vendor;

(ii) ...

(iii) ...

in accordance with the contract of sale; and

(b) all payments that have been made, or are to be made, directly or indirectly, in relation to such goods, by or on behalf of the purchaser;

(i) to the vendor;

(ii) ...

(iii) ...

under any other contract, agreement or arrangement, whether formal or informal, being a contract, agreement or arrangement for the doing of anything to increase the value of the goods or that a Collector is satisfied is so closely connected with the contract of sale referred to in paragraph (a) and to the goods the subject of that contract that together they form a single transaction;

whether the payment is made in money or by letter of credit, negotiable instrument or otherwise, and includes:

(c) the value, as determined by a Collector, of any goods or services supplied, or to be supplied, by, or on behalf of, the purchaser as part of the consideration passing from the purchaser under the contract of sale referred to in paragraph (a); and

(d) the value, as determined by a Collector, of any goods or services supplied, or to be supplied, directly or indirectly, by, or on behalf of, the purchaser:

(i) to the vendor;

(ii) ...

(iii) ...

> under a contract, agreement or arrangement of the kind referred to in paragraph (b);
>
> but does not include the amount of any duty of Customs ..., any sales tax, or any other duty or tax, that is payable by law because of the importation into, or subsequent use, sale or disposition in, Australia of the goods ...".

18 Finally, s 154(1) defines "value unrelated matter", unless the contrary intention appears, in the following way:

> *"`**value unrelated matter**', in relation to goods the subject of a contract for sale, means:*
>
> (a) any rebate of, or other decrease in, the price other than such a rebate or decrease the benefit of which has been received when the price is being determined; or
>
> (b) any costs, charges or expenses in relation to activities undertaken by the purchaser on the purchaser's own account in relation to the goods (including any activities of the purchaser relating to advertising or promoting the sale of, or to warranties or guarantees in relation to the goods)."

19 The approach to be taken to the construction of the relevant provisions was stated by the Full Court in *LNC (Wholesale) Pty Ltd v Collector of Customs* (1988) 17 FCR 154 ("*LNC (Wholesale)*") at 164:

> *"...the legislation provides a basis of valuation that is less theoretical and more practical than the Brussels Definition of Value. Primacy is given to the price actually paid or payable adjusted in accordance with a number of simply stated rules. It is appropriate in the application of these rules to eschew technicality and subtlety and to take a practical commercial view of transactions. In* Inland Revenue Commissioner v Littlewoods Mail Order Stores Ltd *[1963] AC 135 at 153-154, Viscount Simonds, with whom Lord Devlin concurred, referred to the familiar proposition `that the substance alone of the transaction is to be looked at'. Thus, when the definition of price refers to `the aggregate of all payments made, or to be made, directly or indirectly, in connection with the goods by the purchaser to or for the benefit of the vendor...in accordance with the contract', the legislation is looking to what has occurred as a matter of fact, having regard to the substance rather than the form of the transaction, though that is not to deny that the substance of a transaction `is that which results from the legal rights and obligations of the parties ascertained upon ordinary legal principles', per Lord Tomlin in* Inland Revenue Commissioners v Westminster (Duke) *[1936] AC 1 at 20-21."*

20 The specific questions arising on the appeal are whether:

* the average warranty cost, forming part of the price of the Toyota vehicles, is a payment "in relation to such goods" for the purposes of sub-para (a) of the definition in s 154(1) of "price";

* in the event that the average warranty cost constitutes a payment "in relation to" the Toyota vehicles, is that cost required to be excluded from the price for the purposes of the Act on the ground that it falls within sub-para (b) of the definition in s 154(1) of "value unrelated matter" as being a cost, charge or expense in relation to activities undertaken by the purchaser on the purchaser's own account in relation to a warranty or guarantee in relation to the vehicle sold;

* the appeal involves a question or questions of law.

The AAT decision

21 The AAT's reasons as summarised by the primary judge are as follows. The AAT found that the "import sales transaction" included the individual sales contracts, the importer agreements and the **Toyota Warranty** policy. It stated that the identification in the invoice of an amount attributable to warranty costs was "simply the identification of one of the elements constituted in the price arrived at between Toyota Australia and Toyota Japan". It then continued:

> *"17. Finally, the words `in relation to' as used in the definition of `price' in s. 154(1) are words of broad ambit which take their meaning from the surrounding context in which they appear (*Workers' Compensation Board of Queensland v Technical Products Pty Ltd *[1988] HCA 49; (1988) 165 CLR 642 at 653 per Deane, Dawson and Toohey JJ,* Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) *(1996) 69 FCR 531 at 547 per Lehane J with whom Lockhart and Foster JJ agreed). The context of the opening words of the definition of `price' connects the goods to the subject of the individual sales contract. The individual sales contract which, through the terms incorporated by the importer agreements, addresses the issue of warranty cover, but does so as part of the overall contractual arrangements. Where the phrase `in relation to' is used in paragraph (a) of the definition, it is to `all payments ... made directly or* indirectly*' (emphasis added), further indicating the breadth of what is to be comprehended when considering price. Accordingly, an allocation made for warranty costs, whether in an unitemised or an itemised invoice, cannot be characterised as being a separate allocation of cost, and must be regarded as being part of the direct payment made `in relation to' the goods.*
>
> *18. The applicants sought to rely on the following passage from the* Toyota Motor Sales' *case to justify its* [sic] *submission that warranty payments should not be regarded as part of the price. In that case the Full Court of the Federal Court said:*
>
> `... we do not think that in the ordinary parlance of commercial life the reimbursements

can fairly be said to be rebates of, or decreases in, the prices of the relevant vehicles accruing to Toyota Australia by reason of faults or defects in those vehicles. They were payments made to Toyota Australia under arrangements essentially collateral to the purchase of the motor vehicles pursuant to which Toyota Australia was entitled to claim reimbursement in respect of at least some of the expense incurred in meeting its warranty obligations to owners of Toyota vehicles. The contractual arrangements made between the two companies pursuant to which reimbursements were made were plainly independent of the contractual arrangements pursuant to which the motor vehicles were imported.' (pp.29-30)

The Court in its reasons for decision referred to an importer agreement between Toyota Japan and Toyota Australia, but did not refer to the concept of individual sales contracts which has arisen in the instant case. Also it is apparent that the Article 22 referred to by the Court dealing with price, while its equivalent is to be found in Article 18 of B1 (and Article 16 of B2), is differently numbered, and, consequently, it is not apparent that the same importer agreements as were being considered in the Toyota Sales' case are relevant in the instant case. Those differences leave the Tribunal unable to apply the conclusions reached in the Toyota Sales' case to the facts as found in this case, i.e. the Tribunal is unable on the facts of this case to say that arrangements with respect to warranty payments are `essentially collateral' to the purchase of the motor vehicles and therefore should not be included in their price."

22 The AAT then turned to consider the applicability of "value unrelated matter". After quoting para (b) of the definition of that term in s 154(1) the AAT continued:

"19. ...

In Re Sprague Footwear and Collector of Customs *(1990) 24 ALD 300 the Tribunal found that a discount allowed by the supplier for expenses to be incurred by a purchaser (importer) in promoting the sale of the supplier's shoes in Australia did not constitute a value unrelated matter. The Tribunal found that the discount was a cost incurred by the supplier, not the purchaser. However, in as far as the purchaser did incur promotional costs associated with, for instance, advertising, those costs constituted a value unrelated matter `...notwithstanding that they were incurred also on the vendor's behalf and notwithstanding also they were undertaken pursuant to the contract of sale [entered into between the supplier and the Australian importer]' (p.305). The Tribunal agrees with the approach outlined in* Re Sprague.

20. In the facts of this case, the parties agree:

... the Warranty Policy ensures that [Toyota Japan] ultimately bears the cost or the substantial part of the cost of providing warranty repairs by a series of

> reimbursements. Owners of Toyota vehicles bring their vehicles in for repair under warranty to Toyota dealers. The dealers repair the vehicles and seek reimbursement or substantial reimbursement of their costs in performing the repairs from Toyota Australia. Toyota Australia then seeks reimbursement or substantial reimbursement from [Toyota Japan]. (Statement of Agreed Facts, para 28)
>
> An example of a new vehicle warranty issued is set out in annexure E2. While the warranty is expressed to be given jointly by Toyota Australia and Toyota Japan (annexure 2, p.331), it is clear from annexure B1 Article 34(b) (annexure B1, p 26) that Toyota Australia is to assume the initial warranty obligation. While that issue is not dealt with as clearly in any of the other importer agreements before the Tribunal, those agreements state that Toyota Australia cannot be reimbursed by Toyota Japan for costs for work carried out beyond the limitations prescribed in the Warranty Policy (annexure B2 Article 33(b), s. 9(b) of Schedule C of B3, B4 and B5). The Tribunal is satisfied that the latter provisions, at least by implication, pre-suppose expenditure by Toyota Australia for which a claim for reimbursement will be made against Toyota Japan. The Tribunal is, accordingly, satisfied that the above quoted provision from clause 28 of the Statement of Agreed Facts constitutes the method by which warranty payments are made viz, initially, by the dealer claiming against Toyota Australia and, ultimately, by Toyota Australia claiming against Toyota Japan.
>
> 21. From the above, the Tribunal is satisfied that Toyota Australia incurs costs as the result of its obligation arising through the individual sales contracts via the terms incorporated from the importer agreements to pay for warranty costs. However, in turn, Toyota Australia claims reimbursement from Toyota Japan to the extent provided for in the warranty agreement with Toyota Japan. Because those costs are reimbursed by Toyota Japan, they cannot be categorised as warranty costs met by Toyota Australia. Accordingly, the costs do not fall within the description of `value unrelated matter'."

23 It is to be noted that, in the above passage, the AAT is dealing with the costs actually incurred by Toyota Australia and reimbursed by Toyota Japan, which are not the average warranty costs included as a component of the price.

24 The AAT then turned to deal with s 161(2)(b). It said:

> *"22. ...*
>
> *The three requisites set out in sub-clause (b) [of s 161(2)] are compendious. The parties agree, and the Tribunal is satisfied, that any warranty work is carried out after importation of the goods into Australia and, accordingly, the requirements* [sic] *set out in (b)(ii) is satisfied. For the reasons set out in paragraph 28 herein, the Tribunal is*

also satisfied that the calculation as to the amount of warranty payable is an accurate quantification of the cost to be incurred. That cost is quantifiable by reference to the import sales transaction, i.e. there is a contract for the importation of goods into Australia, including agreement with respect to the meeting of costs associated with the giving of a warranty undertaking. The only real question then is whether the costs `... are payable for the ... maintenance of or any technical assistance in respect of the goods' (s.161(2)(b)(i)).

23. In the LNC Wholesale's *case the Full Court of the Federal Court was considering an appeal from a decision of the Tribunal which had determined deductions claimed for advertising costs associated with the import of Fiat motor vehicles and after sales service costs in relation to the import of Audi vehicles should be considered as part of the price and hence be dutiable. The then s.154(2)(b)(iii)(A) is now reflected in the definition of `adjusted price' contained in s.161(2) of the Act. While there is some minor difference in wording between the two provisions, that difference is not relevant for present purposes. In the* LNC Wholesale's *case Davies and Einfeld JJ (with whom Sheppard J agreed)* [sic - in fact Sweeney J] *accepted that in as far as the Audi claim was concerned, the obligation to meet warranty payments appeared to fall within the definition of `adjusted price' as being part of `maintenance'. Since, however, the Tribunal at first instance did not consider this aspect, the matter was remitted for rehearing. The Court did not attempt to examine the scope of the meaning to be attributed to `maintenance' in the context in which it is used in the definition.*

24. In Re Saab-Scania *the Tribunal had the opportunity of examining the scope in the context of warranty provisions relating to Saab motor vehicles. There the Tribunal found that the discharge of warranty obligations did amount to maintenance. After referring to the comments of Davies and Einfeld JJ in the* LNC Wholesale's *case, the Tribunal stated:*

It is our understanding ... that their Honours intended, when referring to the maintenance of the goods, to relate what they wrote to all the costs, charges and expenses incurred in discharge of the obligations undertaken by LNC under its Audi Cover scheme. Although the removal of a defective part from a motor car and its replacement with a sound part does not constitute maintenance of the defective part, in our view maintenance of the motor car does comprise the replacement of defective parts by sound parts in order to maintain its integrity as an operable motor car.

25. Davies and Einfeld JJ outlined the background of Australia's adoption of the GATT Protocol (being the Protocol to the Agreement on Implementation of Article VII of the GATT of 12 April 1979) in the LNC Wholesale's case at pages 564 to 566. The GATT Protocol in Article 18 established a Technical Committee on Customs Valuation. That committee was to provide technical advice as requested, particularly

with respect to uniformity in interpretation and application of the Protocol (see annexure II to the Protocol). While, as of 1 January 1995, GATT has been replaced by the World Customs Organisation, the function of that committee has continued. It has issued an Explanatory Note specifically relating to Article 1 of the Protocol in which it draws the following distinction between the terms `maintenance' and `warranty'.

5. ...

- Maintenance is a form of preventative care on goods such as industrial facilities and equipment to ensure the upkeep of those facilities and equipment to a standard which enables them to perform the function for which they were acquired;

- Warranty is a form of guarantee on goods, such as motor vehicles and electrical appliances, which covers costs of correcting defects (parts and labour) or replacement subject to certain conditions being met by the warranty holder. If those conditions are not met, warranty can be voided. Warranty covers hidden defects in the goods, i.e. defects which should not exist and which prevent the use of the goods or reduce their usefulness;

- Maintenance must always be performed, whereas warranty is only a contingency measure which might be invoked in the case of failure or under-performance of goods.

6. There is, therefore, a fundamental difference between the two concepts, and the term `maintenance' ... cannot be applied to warranties.

The words used in the statute where they have their genesis in an international agreement `... should be construed consistently with the terms of the international instruments': ICI Australia Operations Pty Ltd v Fraser (1992) 34 FCR 564 at 569, 570; 106 ALR 257; Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority and Fraser (1995) 56 FCR 406 at 417; 129 ALR 401' (Lehane J in Norland Papier AG v Anti-Dumping Authority [1999] FCA 10; (1999) 161 ALR 120 at 127).

26. The Tribunal further notes that in the definition of `value unrelated matter', contained in s.154(1) of the Act, references are made in sub-clause (b) to `warranties ... in relation to, the goods', whereas s. 161(2)(b)(i) contains no reference to `warranty' but does contain the reference to `maintenance'. This suggests that the two terms have been used to fulfil different legislative purposes and that their use ought be distinguished.

27. Finally, the Tribunal is of the view that the matters referred to in s.161(2)(b)(i) should be read ejusdem generis. In the context in which it is used the word `maintenance' relates to `assembly, erection, construction ... [the provision of]

> technical assistance in respect of, the goods' and carries with it a connotation of the installation of an item of plant or equipment. The giving of a warranty associated with the importation of an individual motor vehicle does not provide, in the opinion of the Tribunal, a contextually apposite description for `maintenance'. An application of the above leaves the Tribunal satisfied that the warranty should not be regarded as part of the `adjusted price'."

25 It is quite clear that, in disposing of the appeal before it, the AAT did not address the question of whether the average warranty cost was a "value unrelated amount" as defined in s 154(1). Rather, it addressed the quite different questions of whether the actual amounts expended by Toyota Australia were to be disregarded as being a value unrelated matter or whether the average warranty costs were payable for the maintenance of, or any technical assistance in respect of, the goods for the purposes of s 161(2)(b)(i).

The decision of the primary Judge

26 For the purposes of disposing of the present appeal it is only necessary to refer to three aspects of the decision of the primary Judge. First, his Honour was satisfied that the appeal involved a question of law so far as it concerned the application of the facts to the words in the statute and, in particular, whether the component paid in respect of average warranty costs were "payments...made...in relation to such goods `in the definition of' `price' in s 154(1)". Relying, in particular, on *Hayes v Federal Commissioner of Taxation [1956] HCA 21;* (1956) 96 CLR 47 at 51 his Honour found that, as the ultimate fact at issue involved the application of a term used in a statute, the question of whether the facts adduced to prove or disprove that ultimate fact was a question of law.

27 The second relevant aspect of the judgment at first instance relates to his Honour's decision that the average warranty costs were not payments "in relation to" the vehicles and thus not part of the price as defined by s 154(1). His Honour regarded the payment as a form of insurance premium, stating that the payments were for an indemnity in respect of Toyota Australia's liability to customers for warranty repairs. His Honour found, in effect, that the payment of average warranty costs was a payment that was severable and separate from the price paid for the vehicles; it was a payment for the right to be indemnified against a potential liability of a particular kind. He concluded that the payment was not paid in respect of the acquisition of goods, stating at [47]:

> *"In the present case the warranty insurance arrangements were `essentially collateral' to the purpose and `plainly independent of the contractual arrangements pursuant to which motor vehicles were imported'."*

28 The third relevant aspect relates to whether the average warranty costs were a "value unrelated matter". His Honour stated at [58]-[60]:

> *"I agree with Toyota Australia's submissions that the AAT did not consider this*

argument but instead confused `costs' with the* actual *expenditure* incurred by *Toyota Australia on warranty repairs. In par 21 of its reasons, quoted above, the AAT refers to `costs reimbursed by Toyota Japan', that is to say the costs incurred by Toyota Australia in carrying out warranty work. But Toyota Australia's argument on issue (ii) related to the average warranty cost it paid to *Toyota Japan, that is to say, in the example given, the $104.*

In my opinion, the average warranty costs fall within par (b) of the definition of `value unrelated matter'. They were costs in relation to activities undertaken by Toyota Australia on its own account - the giving of warranties to consumers - in relation to the vehicles. If Toyota Japan failed, Toyota Australia would still be liable to consumers on warranties because it contracted with them as principal. The express inclusion of `warranties' further confirms this.

It is to be noted that the sums in question, being payments for the indemnity rights, are themselves never reimbursed or repaid. The monies which may, in the case of some vehicles, flow back to Toyota Australia are fruits of the thing purchased by it."

Reasoning on the appeal

(a) A payment "in relation to" the goods

29 The conclusion of the primary judge that the component paid as the average warranty cost was not a payment "in relation to" the goods purchased was based on his finding that the cost constituted a separate and severable payment for a right of indemnity in respect of the cost of warranty repairs incurred by Toyota Australia. However, on the agreed facts and on the facts found by the AAT, the average warranty cost merely formed a component of the price paid for the goods and were not capable, as such, of being severed from or treated as a separate part of that price. While it is true that the overall price calculated by Toyota Japan was agreed by the parties as having included the average warranty cost, the price paid for each vehicle was a total price for the goods. Consequently, his Honour erred in concluding, as he did, that the average warranty cost was able to be treated as a separate item payable for a right of indemnity rather than as an amount payable as a component of the price paid for the goods. As an unseverable component it would be difficult to conclude, for the purposes of sub-para (a) of the definition of "price" in s 154(1), that the component was not a payment "in relation to" the goods. Further, while it was not inaccurate to describe the relevant component as a payment for a right of indemnity it is to be observed that the indemnity is in respect of warranty costs in relation to the vehicles. However, regardless of how the component is described, the question must be whether the component is a payment "in relation to" the goods.

30 Ordinarily, the words "in relation to", as used in sub-para (a), are to be given a broad meaning. The expression is one of wide connotation and requires a relation between one thing and another. In *Hatfield v Health Insurance Commission* (1987) 15 FCR 487 Davies J stated at 491:

> *"Expressions such as `relating to', `in relation to', `in connection with' and `in respect of' are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute ...*
>
> *The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear."*

31 The above passage has been cited with approval by Full Courts of this Court in *Burswood Management Limited v Attorney-General (Cth)* (1990) 23 FCR 144 at 146 and *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 845 at [28].

32 Putting to one side the fact that the warranties were, necessarily, closely related to the goods, both the context in which the words are used, and the words with which they are associated, suggests that payments in a contract between a vendor and purchaser that relate to the costs that may be incurred by the purchaser to customers in respect of warranty repairs, are payments "in relation to" the goods sold. This conclusion is reinforced by the fact that para (b) of the definition of "value unrelated matter" in s 164 expressly treats costs, charges or expenses relating to warranties or guarantees as being payments "in relation to" the goods the subject of the warranties or guarantees and thus as part of the initial computation of price to be then disregarded in making the ultimate calculation. Thus, there appears to be a plain legislative intent that warranty costs are to be regarded as payments "in relation to" the goods the subject of the warranty.

33 Further, the treatment of such costs as payments "in relation to" the goods is consistent with the overall legislative purpose. That purpose, which is apparent from the provisions to which we have referred above, is to define the items that are to be included in the determination of price in broad terms with specific statutory exceptions: see s 161(2) in respect of the "adjusted price" and s 154(1) in respect of "value unrelated matters". It would be inconsistent with that purpose to give the words "in relation to" in the definition of "price" a narrow meaning.

34 There is an analogy with the approach taken by the High Court in the context of sales tax where, in the legislation as originally enacted, liability was ordinarily to be calculated by reference to the amount for which the goods in question were sold, ie the contract price (cf per Dixon and McTiernan JJ in *Commonwealth Quarries (Footscray) Proprietary Limited v The Federal Commissioner of Taxation [1938] HCA 13;* (1938) 59 CLR 111 at 121). This included all elements in the total amount the taxpayer had to pay to attain title in the goods agreed to be purchased: *E.M.I. (Australia) Limited v Commissioner of Taxation of the Commonwealth* (1971) 45 ALJR 349 at 353.

35 Whatever might be the case if arms-length parties were to negotiate a consideration for the purchase of the car and a separate consideration for the contractual obligation to reimburse the

purchaser for amounts paid to third parties for warranty claims, there can be no doubt here that the vehicle price was the total amount invoiced by Toyota Japan to Toyota Australia for the particular car. It matters not, for this purpose, that a component of the amount was the average cost which Toyota Japan had calculated would be required to reimburse Toyota Australia the cost of warranty claims which the latter company would initially be required to outlay.

36 Accordingly, for the above reasons, and those stated by the AAT in [17]-[18] in its reasons, we are satisfied that the primary judge erred in law in concluding that the component of the price that relates to average warranty cost is not a payment made in relation to the vehicle the subject of the individual sales contract between Toyota Japan and Toyota Australia.

(b) A "value unrelated matter"

37 The main question argued on the appeal was whether the average warranty costs were to be disregarded as a "value unrelated matter" as they were costs, charges or expenses in relation to activities undertaken by the purchaser on the purchaser's own account relating to warranties in relation to the goods.

38 Contrary to the submission of the appellant, the fact that the average warranty costs are a component of the total price, but are not capable of being separated or severed from that price, is not of significance as part of the calculation of the "price" requires the appellant, in making his determination of price, to disregard "value unrelated matters in relation to those goods". Thus, the task of the appellant is to determine whether, in relation to goods the subject of the contract of sale, any costs, charges or expenses which would otherwise fall within the definition of price are required to be disregarded because they fall within sub-para (b) of the definition of "value unrelated matters" in s 154(1). While the appellant may be assisted by the manner in which the parties have dealt with particular costs charges and expenses in their contract of sale, the appellant's statutory direction to disregard value unrelated matters in determining price cannot be circumscribed by the manner in which the parties choose to treat the relevant item in their contract.

39 The real issue in the present case is whether the average warranty costs are payments "in relation to" activities undertaken by the purchaser on the purchaser's own account in relation to warranties in relation to the goods. The average warranty costs are based on Toyota Japan's pre-estimate of the likely cost of the liability undertaken by Toyota Australia in giving and honouring its warranty obligations to customers in respect of warranty repairs under the **Toyota Warranty** policy. In return for payment of those costs, which for the purposes of this case the parties agreed formed a component of the calculation of the purchase price, as part of the price the actual costs are to be reimbursed. Thus, the average warranty costs can be seen to relate to activities undertaken by Toyota Australia in relation to warranties it gives or its own account in relation to the cars it imports.

40 The giving and honouring of obligations undertaken by Toyota Australia to its customers is an *activity* undertaken by Toyota Australia on its own account in relation to the goods. Toyota Australia

has undertaken, inter alia, a several liability under the warranty, and is therefore itself liable to consumers in respect of warranty repairs. Thus, when Toyota Australia provides warranty repairs, or reimburses a dealer for providing warranty repairs, it is doing so on its own account in relation to the goods, rather than in any other capacity. There is nothing in the **Toyota Warranty** Policy, in the individual contracts of sale or the importer agreements to the effect that Toyota Australia is giving or honouring *its* warranty obligations as agent for Toyota Japan, or on any account other than its own. The requirement under the importer agreements that Toyota Australia be reimbursed in respect of those costs by Toyota Japan does not alter that fact. Nor does the fact that the warranty obligations of Toyota Japan and Toyota Australia are joint and several alter the fact that the warranty repairs for which Toyota Australia is liable is a liability on Toyota Australia's own account.

41 Although the primary judge erred in treating the average warranty costs as severable from the price paid in relation to the goods, his Honour did not err in finding that those costs fell within para (b) of the definition of "value unrelated matters" in s 154(1), as they were costs in relation to activities undertaken by Australia on its own account in relation to warranties in relation to the goods sold. Although we are in agreement with his Honour's conclusion that the costs relate to the *giving* of warranties to consumers, we would add that they are also for the *honouring* of warranties to consumers. Therefore, in our view it is more accurate to say that the entitlement to reimbursement in respect of the cost of warranty repairs arises by reason of the giving *and* honouring of the warranties.

42 The above conclusion is consistent with the decision of the Full Court in *LNC (Wholesale)*. One of the payments the subject of that case concerned the agreement between the Australian distributor of Audi Motor vehicles and the manufacturer of those vehicles in Germany that the manufacturer was to make a contribution to the costs of after sales service in respect of the vehicles. The manufacturer agreed in principle to contribute 50% of the anticipated costs by reducing the price of each Audi 100 by DM 350. The Tribunal accepted that the price payable was the reduced price in accordance with the agreement, but concluded that the amount was to be added back in calculating the value of the goods. Relevantly, for present purposes, one of the reasons given by the Full Court for concluding that the Tribunal erred in reaching that conclusion was stated (at 170) as follows:

> *"...even though there may have been an agreement between LNC and Volkswagenwerk AG that LNC would provide Audi Cover, it would seem that that cover was provided by LNC on its own account. It did not provide the cover for or as agent of Volkswagenwerk AG. It seems that the cover was provided by LNC in its own name and that it was solely responsible for complying with the warranties given. The fact that Volkswagenwerk AG was prepared to reduce the price of its vehicles to assist LNC to provide the cover does not provide a basis for a finding that Audi Cover was provided by LNC otherwise than on its own account. Accordingly, s 154(2)(a)(ii) precluded the Collector from having regard to the cost or expense and therefore the value thereof."*

43 The conclusion of their Honours (under not relevantly distinguishable statutory provisions) is also

applicable to the facts of the present case. In *LNC (Wholesale)* the sales price was reduced by the amount payable in respect of the equivalent of the "warranty" costs, whereas in the present case that amount formed a component of the price. Either way, the amount in question falls within the definition of a "value unrelated matter" which, as was said by the Full Court, "precluded the Collector having regard to the cost or expense and therefore the value thereof".

(c) A question of law

44 Extensive submissions were made on behalf of the appellant to the effect that the appeal to the primary judge did not involve a question of law. However, on the basis of the conclusions at which we have arrived, it is plain that the appeal did raise a question of law. Notwithstanding that it was Toyota Australia's case before the AAT, inter alia, that the average warranty costs fell within para (b) of the definition of "value unrelated matter" and were to be disregarded, the AAT did not address that matter. It only addressed an additional submission, namely:

> *"Whether the costs `...are payable for the...maintenance of or any technical assistance in respect of the goods'."* (s 161(2)(b)(i))

45 Thus, in failing to address a central question raised by the Toyota Australia's case *and* by the material 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] HCA 47;* (1992) 175 CLR 408 at 424-425 per Brennan J and *Stewart William Noble v Repatriation Commission* (Beaumont, Branson and Merkel J, unreported, 3 November 1997) at 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, *Sinclar v Mining Warden at Maryborough* [1975] HCA 17; (1975) 132 CLR 473 at 483 and *Craig v The State of South Australia [1995] HCA 58;* (1995) 184 CLR 163 at 179. Thus, the appeal to the primary judge plainly involved a question of law.

Conclusion

46 For the above reasons the appeal is to be dismissed with costs. There is, however, one matter of concern in relation to the form of the orders made by the primary judge. His Honour ordered, inter alia at [64]:

> *"...the case be remitted to the AAT with directions that the decisions of the respondent under review be set aside and that the customs value of the vehicles in question be recalculated by the respondent on the basis that the average warranty cost in relation to each vehicle be not included."*

47 The matter of concern is that, ultimately, the determination of average warranty cost is a matter

for the appellant rather than for the Court. That may be a matter of significance in the present case as the evidence before the AAT was not altogether clear as to whether, in all cases, the average warranty cost is able to be established as simply as is suggested by his Honour's order. Rather than hinder or impede the process by which the appellant might arrive at a determination of "price" in respect of goods, it is appropriate that his Honour's order be varied so that the matter be remitted to the AAT with a direction that the decisions of the appellant under review be set aside, and that the customs value of the vehicles in question be recalculated by the appellant in accordance with these reasons for judgment.

48 Finally, it appears from the Tribunal's reasons that it had before it not merely a large number of applications by Toyota Australia to review determination by the appellant in respect of a large number of vehicles imported into Australia by it but applications for review lodged by other applicants which likewise raised the question how to treat the average cost of warranty reimbursement for customs purposes.

49 The parties in the present case proceeded on an agreed basis that the average cost of warranty was in fact a component of the actual purchase price. However, whether the purchase price in a particular case is actually calculated so that the average cost of warranty reimbursement is a component of the price is a matter of fact which would need to be proved if not agreed. For example prices maybe calculated by reference to a need to match competitors' prices or other commercial exigencies rather than by reference to an amount necessary to recapture all costs including the costs of reimbursing third party claims together with a profit margin. It cannot, therefore, be assumed merely from the fact that a particular figure represents the average cost of reimbursing claims that that figure, or the whole of that figure, is in fact a component of the price that represents the cost or a charge to the purchaser of the vehicle of its giving or honouring warranties.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill, North and Merkel JJ.

Associate:

Dated: 19 September 2000

Counsel for the Applicant:	Mr A Pagone QC with Ms MM Gordon
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	Mr AL Cavanough QC with Mr HR Carmichael

Solicitor for the Respondent:	Bartier Perry
Date of Hearing:	10 and 11 August 2000
Date of Judgment:	19 September 2000
