JUDGMENT No. 128 / 92

C A T C H W O R D S

Customs - Anti-dumping - judicial review of recommendations made by the Anti-Dumping Authority to the Minister not to publish dumping duty notices - whether Anti-Dumping Authority made an error of law on the requirement under sub-s.269TG(1) of the Customs Act for a causal link between material injury suffered by the Australian industry and the dumping - meaning of "because of that" and "material injury" in sub-s.269TG(1) discussed.

Administrative Decisions (Judicial Review) Act 1977
Anti-Dumping Authority Act 1988
Customs Act 1901
Customs Tariff (Anti-Dumping) Act 1975

Tasman Timber Ltd & Others v. Minister for Industry and Commerce & Anor (1983) 46 ALR 149
Swan Portland Cement Ltd and Anor v. Minister for Small Business and Customs and Anor (1991) 28 FCR 135
Air Caledonie International & Anor v. The Commonwealth of Australia (1988) 165 CLR 462
Gardner Smith Pty Ltd v. Collector of Customs, Victoria (1986) 66 ALR 377
Australian Federation of Construction Contractors; ex parte Billing (1986) 68 ALR 416
GTE (Aust) Pty Ltd v. Brown (1986) 14 FCR 309
Feltex Reidrubber Ltd v. Minister for Industry and Commerce & Anor (1983) 46 ALR 171
Swan Portland Cement Ltd and Anor v. Minister for Science, Customs and Small Business & Anor (1989) 88 ALR 196
C.A. Ford Pty Ltd trading as Caford Castors v. The Comptroller-General of Customs and the Anti-Dumping Authority (unreported judgment 8 March 1991)

No. G735 of 1991 and G736 of 1991

ICI AUSTRALIA OPERATIONS PTY LTD v. **DONALD FRASER, THE ANTI-DUMPING AUTHORITY AND THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS**

BLACK C.J., NEAVES & VON DOUSSA JJ.

SYDNEY

20 MARCH 1992

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY)
)
GENERAL DIVISION) No. G735 of 1991
No. G736 of 1991

BETWEEN:

ICI AUSTRALIA OPERATIONS PTY LIMITED

Appellant

- and -

DONALD FRASER

First Respondent

THE ANTI-DUMPING AUTHORITY

Second Respondent

THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS

Third Respondent

MINUTES OF ORDER

JUDGES MAKING ORDER	:	BLACK C.J., NEAVES & VON DOUSSA JJ.
WHERE MADE	:	SYDNEY
DATE OF ORDER	:	20 MARCH 1992

THE COURT ORDERS THAT:

Matter No. G735 of 1991

1. The appeal be dismissed.

2. The appellant pay the costs of the respondents.

Matter No. G736 of 1991

1. The appeal be dismissed

2. The appellant pay the costs of the respondents.

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

IN THE FEDERAL COURT OF AUSTRALIA)
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NEW SOUTH WALES DISTRICT REGISTRY)
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BETWEEN:

ICI AUSTRALIA OPERATIONS PTY LIMITED

Appellant

- and -

DONALD FRASER

First Respondent

THE ANTI-DUMPING AUTHORITY

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THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS

Third Respondent

REASONS FOR JUDGMENT

Coram: Black C.J., Neaves and von Doussa JJ.

Place: Sydney

Date : 20 March 1992

THE COURT: These are two appeals from a single Judge of this Court (Gummow J.) in closely connected matters against the dismissal of applications for orders of review under the Administrative Decisions (Judicial Review) Act 1977 ("the ADJR Act"). The issue in the appeals concerns the construction of sub-s.269TG(1) of the Customs Act 1901, and in particular the causal connection between dumped goods exported to Australia and actual or threatened material injury to an Australian

industry which the sub-section requires to enliven the power of the Minister to publish a notice which will have the effect of imposing dumping duty. The sub-section reads:

> "269TG.(1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia, that:
>
> (a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and
>
> (b) because of that:
>
> (i) material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered; or
>
> (ii) in a case where security has been taken under section 42 in respect of any duty that may become payable on the goods under section 8 of the Anti-Dumping Act - material injury to an Australian industry producing like goods would or might have been caused if the security had not been taken;
>
> the Minister may, by notice published in the *Gazette*, declare that section 8 of that Act applies to those goods."

Sub-section 269TG(1) concerns goods that have been exported to Australia. Sub-section 269TG(2) concerns goods which may be exported to Australia in the future, and gives rise to a similar point of construction; it reads:

> "(2) Where the Minister is satisfied, as to goods of any kind, that:
>
> (a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be

less than the normal value of the goods; and

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

the Minister may, by notice published in the *Gazette* (whether or not he or she has made, or proposes to make, a declaration under subsection (1) in respect of like goods that have been exported to Australia), declare that section 8 of the Anti-Dumping Act applies to like goods:

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

(d) the amount of the export price of which is less than the amount of their normal value."

By definition in s.269T the "Anti-Dumping Act" means the Customs Tariff (Anti-Dumping) Act 1975, and that title is adopted in this judgment.

The applications for orders of review were brought by the appellant concerning reports made by the second respondent, the Anti-Dumping Authority ("the ADA"), under s.7 of the Anti-Dumping Authority Act 1988 ("the ADA Act") the recommendations in which were accepted and acted upon by the Minister, the third respondent. The first respondent is the member constituting the ADA. The first application arises out of ADA Report No.38 which was published on or about 10 July 1991. The second application arises out of ADA Report No.44 which was published on or about 11 September 1991.

The Reports followed allegations as to dumping of low density polyethylene ("LDPE"), a thermoplastic, having a

1991 the Minister, pursuant to s.269TL of the Customs Act, acted on the recommendation.

Following the announcement of the preliminary finding in relation to the imports from 6 countries, the appellant on 27 February 1991, pursuant to sub-s.269TF(1) of the Customs Act, referred the decision of the Comptroller-General to the ADA for review under s.8 of the ADA Act. On 29 April 1991 the ADA published Report No.34 which revoked the preliminary finding, and substituted a finding that there were sufficient grounds for the publication of a dumping notice in respect of LDPE exported by those 6 countries. By virtue of sub-s.269TF(3) of the Customs Act the substituted finding had effect as a preliminary finding of the Comptroller-General which had been duly referred to the ADA. The ADA then embarked on an inquiry under s.7 of the ADA Act regarding exports from the 6 countries which led to the publication of Report No.44. On 10 September 1991 the Minister, again acting under s.269TL of the Customs Act, accepted the recommendation of the ADA that the Minister take no action under s.269TG in relation to exports of LDPE from these countries.

The conclusions in Reports Nod.38 and 44 are expressed in similar ways. Those in Report No.38 read:

> " - LDPE was exported from [the 10 countries] at dumped prices;
>
> - the Australian industry producing like goods suffered material injury in 1990; and

> - there is no causal link between imports of LDPE at dumped prices and material injury suffered by the Australian industry."

In the first paragraph of the conclusions in Report No.44, the 6 countries are named in place of the 10 countries; the second and third paragraphs are identically worded; and a fourth paragraph has been added which reads:

> "- there is no threat of material injury from dumped imports from these countries".

A similar conclusion that there was no threat of material injury from dumped imports from the 10 countries was expressed in the body of Report No.38 but was not repeated in the conclusions.

The reasoning by the ADA leading to these conclusions is discussed later in this judgment, but it is necessary to say at this stage that in expressing the conclusion that "the Australian industry producing like goods suffered material injury in 1990" the ADA is expressing a conclusion that the Australian industry's performance overall (having regard to sales, market supplies, market share, prices, and profits and profitability) in 1990 was poor in relation to 1988 and 1989, and below market trends. The "material injury" referred to includes all detriment suffered by the Australian industry regardless of the causes which produced it.

The appellant in seeking orders of review contended

before the primary Judge that the recommendations of the ADA, and in turn the decisions of the Minister, were vitiated by reviewable "error of law" within the meaning of para.5(1)(f) of the ADJR Act founded on a misconstruction of sub-s.269TG(1). It was argued that the ADA had erroneously propounded a conclusion that, for the purpose of s.269TG, material injury could have been caused to the Australian industry "because of" the dumped imports only if those imports had been the sole cause of the material injury which the ADA found had been suffered in 1990. The appellant drew attention to certain passages in the Reports which were said to indicate this error. The primary Judge rejected the submission. His Honour held that the Court should approach its task under the ADJR Act sensibly and in a balanced way, not reading passages in isolation from others to which they may be related, and not taking particular passages out of the context in which they appear in the Reports. When the Reports were read as a whole they did not indicate the alleged error.

Before this Court the appellant again advanced the contentions that the ADA applied a "sole cause" test, and that on the proper construction of s.269TG of the Customs Act, that is an erroneous test. In the alternative, the appellant submitted that if the ADA did not apply a "sole cause" test, but applied the test described by the primary Judge in his reasons for judgment, that test also involved a misconstruction of s.269TG. Counsel for the appellant contended that Gummow J. propounded a "substantial

contribution" test. To understand this submission it is necessary to consider the approach which the ADA adopted in the application of the provisions of s.269TG to the facts. Further discussion of the alternative submission is therefore deferred until later in this judgment.

The legislative scheme by which anti-dumping, and countervailing, measures are imposed by Australian law is presently found in Part XVB of the Customs Act (comprising sections 269T to 269U), the ADA Act and the Anti-Dumping Act. By s.6 of the Anti-Dumping Act the Customs Act is incorporated and is to be read as one with the Anti-Dumping Act. These legislative provisions reflect Australia's international rights and obligations in respect of anti-dumping and countervailing measures arising from Australia's membership of the General Agreement on Tariffs and Trade ("GATT"), and the GATT Agreements negotiated in 1979 during the Tokyo Round of Multilateral Trade Negotiations known as the Agreement on Implementation of Article VI of the GATT (the revised GATT Anti-Dumping Code) and the Agreement on Interpretation and Application of Articles VI, XVI and XXXIII of the GATT (the GATT Code on Subsidies and Countervailing Duties). A discussion of the history of the legislation may be found in Tasman Timber Ltd & Others v. Minister for Industry and Commerce & Anor. (1983) 46 ALR 149 at 151-153. The basic principles relating to anti-dumping and countervailing measures are expressed in Article VI of the GATT. In relation to anti-dumping Article VI provides, in part:

> "1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry...
>
> ...
>
> 6.(a) No contracting party shall levy any anti-dumping... duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping...is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

The Anti-Dumping Act was enacted in 1975 to give effect to Australia's decision to become a signatory to the GATT Anti-Dumping Code: second reading speech, House of Representatives, 6 March 1975, Hansard pp.1188-1189. The Act was revised in 1981 to enable Australia to become a signatory to the revised GATT Anti-Dumping Code and the GATT Code on Subsidies and Countervailing Duties: second reading speech, House of Representatives, 6 May 1981, Hansard p.2040. A prerequisite to the signing of these Codes is that national laws conform to their provisions: revised GATT Anti-Dumping Code, Article 16: 6(a), GATT Code on Subsidies and Countervailing Duties, Article 19: 5(a). However, the GATT, and the GATT Codes, are part of the Australian municipal law only to the extent that the Australian Acts are a domestic implementation by the Commonwealth Parliament of Australia's ratification of them: Tasman Timber Ltd & Others v. Minister for Industry and Commerce & Anor at 153; Swan Portland Cement Ltd and Anor v. Minister for Small Business and Customs and

Anor. (1991) 28 FCR 135 at 146.

In the terms enacted in 1975, s.8 of the Anti-Dumping Act provided:

> "8.(1) Subject to sections 13 and 14, where the Minister is satisfied, as to any goods that have been exported to Australia, that -
>
> (a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and
>
> (b) by reason thereof -
>
> (i) material injury to an Australian industry has been or is being caused; or
>
> (ii) ...
>
> the Minister may, by notice published in the *Gazette*, declare that this section applies to those goods."

The section went on to provide in sub-s.(3) for the charging, collecting and payment of a special duty of Customs to be known as dumping duty. Sub-paragraph 8(1)(b)(i) underwent amendment by Act No.66 of 1981 and Act No.69 of 1988, but the words "by reason thereof" which linked paras.8(1)(a) and 8(1)(b) remained.

The legislative scheme underwent major restructuring in 1989 into discrete taxing and non-taxing Acts following the decision of the High Court in Air Caledonie International & Others v. The Commonwealth of Australia (1988) 165 CLR 462. This involved the repeal of a substantial number of the provisions of the Anti-Dumping Act (see the Customs Tariff

(Anti-Dumping) Amendment Act 1989, Act No.173 of 1989), and the transfer of those provisions to Part XVB of the Customs Act (see the Customs Legislation (Anti-Dumping) Act 1989, Act No.174 of 1989). Section 269TG of the Customs Act contained the corresponding provision to the repealed sub-sections of s.8 of the Anti-Dumping Act. In the restructuring process the words "by reason thereof" were replaced by the words "because of that" in s.269TG.

The Explanatory Memorandum to the Customs Legislation (Anti-Dumping) Bill 1989 notes that in the transfer of provisions from one Act to the other, some provisions underwent "slight redrafting, to accord with modern drafting style". The modern drafting style was not, however, adopted in the transfer of some other provisions which reflect the requirement of a causal connection between dumped goods and material injury to an Australian industry: see ss.269TAE and 269TN(4) of the Customs Act - formerly s.5A and 13(4) of the Anti-Dumping Act. These sections still use the phrase "by reason of".

From the enactment in 1975 of s.8 of the Anti-Dumping Act until the 1989 amendments the power exercisable by the Minister to publish a dumping duty notice was conditioned on there being a causal connection between dumped goods and material injury to an Australian industry connoted by the words "by reason thereof". The change in expression used to describe that causal connection to "because of that" in

s.269TG does not indicate a legislative intention to amend the substance of the section in 1989.

In construing the 1975 legislation, and the amendments which have followed, it is permissible to have regard to extrinsic material to discover the purpose or object of the legislation and to confirm that the literal meaning was intended, or, if a provision is ambiguous or obscure, to determine the meaning of the provision: s.15AB(1) of the Acts Interpretation Act 1901, Gardner Smith Pty Ltd v. Collector of Customs, Victoria (1986) 66 ALR 377 at 383-384. The extrinsic material may include any treaty or other international agreement that is referred to in the Act, and the second reading speech (para.15AB(2)(d) and (f)). See also GTE (Aust) Pty Ltd v. Brown (1986) 14 FCR 309 at 334. Reference has already been made to the GATT and second reading speeches to identify the purpose of the 1975 legislation in which s.269TG has its origin. Neither counsel for the appellant, nor counsel for the respondents, submitted that the GATT, or other extrinsic material would assist the Court in construing the provisions presently under consideration. Counsel argued that the meaning could and should be ascertained from the language of the legislation. If that language is unambiguous it must prevail: Re Australian Federation of Construction Contractors; ex parte Billing (1986) 68 ALR 416 at 420; Barry R. Liggins Pty Ltd v. Comptroller-General of Customs & Others (1991) 103 ALR 565 at 573.

The anti-dumping legislation underwent major reviews in 1983 and in 1986-1988 which led to the amendments contained in Acts Nod.1 and 2 of 1984, and 69 and 76 of 1988, and the enactment of the ADA Act in 1988. These amendments refined the procedures for the initiation and subsequent investigation of alleged dumping, and the imposition of anti-dumping measures where dumping or the threat of dumping is found to exist, but the basic requirement of causal connection between dumping and material injury to an Australian industry expressed by s.8 of the 1975 Anti-Dumping Act has remained unchanged. Provisions subsequently introduced, to which reference will shortly be made, point to the meaning intended by the requirement of that causal connection, now contained in s.269TG of the Customs Act, but do not purport to alter it. The starting point must therefore be the language of the 1975 Anti-Dumping Act. The relevant provisions of sub.ss.8(1) and (3) have already been mentioned. Sub-sections 8(4) and (5) provided:

> "(4) Subject to sub-section (5), the dumping duty in respect of goods is a sum equal to the amount by which the amount of the export price of the goods is less than the amount of the normal value of the goods.
>
> (5) The Minister may, by notice published in the *Gazette*, direct that the dumping duty in respect of goods is an amount to be ascertained by reference to the value, or to the weight or other measure of quantity, of the goods less the amount, if any, by which that amount exceeds the dumping duty that would be payable in respect of the goods under sub-section (4), and the notice has effect accordingly."

Sub-section 20(1) provided:

> "20.(1) The Minister may, by notice published in the *Gazette*, revoke a notice published in pursuance of this

> Act and shall do so if he is satisfied that, if the notice were not in force, he would not be authorised by this Act to cause the notice to be published."

The object of the 1975 legislation is to protect Australian industry (see Tasman Timber Ltd & Others v. Minister for Industry and Commerce & Anor, at p.151 and Feltex Reidrubber Ltd v. Minister for Industry and Commerce & Anor (1983) 46 ALR 171 at 182) by providing relief from the anti-competitive effects that dumped goods may have on domestic producers, whilst at the same time ensuring that protective measures adopted by the imposition of duties do not unjustifiably impede international trade. This object is to be achieved by imposing dumping duty which does not exceed the dumping margin (sub-s.8(4)), and may be less (sub-s.8(5)), for so long only as the dumping, or threat of dumping, will cause material injury to an Australian industry. The relationship required between the dumping and material injury to an Australian industry is therefore a close one. The material injury against which the Act provides relief is the material injury attributable to the dumping, and to no other cause.

Subsequent amendments include the enactment of provisions now contained in sub-s.269TAE(1), and the ADA Act. Sub-section 269TAE(1) concerns the determination, for the purposes, inter alia, of s.269TG, whether material injury to an Australian industry has been or is being caused or is threatened or would or might have been caused, or whether the establishment of an Australian industry has been materially

hindered, by reason of any circumstance in relation to the exportation of goods to Australia from another country. The sub-section enumerates matters to which the Minister may have regard for that purpose, but is not exhaustive. The provisions of the sub-section, read with sub-s.269TG(1), make clear that the subject matter of sub-s.269TG(1), is not material injury to an Australian industry in the abstract, but material injury causally connected to, "by reason of" or "because of", dumping. By whatever steps the deliberations occur during which the Minister has regard to the matters relevant to the determination of "material injury", whether they be matters enumerated in sub-s.269TAE(1) or otherwise, the ultimate issue for the Minister is whether he or she is satisfied that there has been material injury causally connected in the manner required by the legislation to the dumping of goods that have been exported to Australia.

The ADA Act in 1988 established the ADA with the function, among others, of recommending to the Minister under s.7 whether the Minister should publish a dumping duty notice. Sub-section 7(1) provides that where, in relation to an application under s.269TB of the Customs Act, the Comptroller-General refers to the ADA under sub-s.269TD(2) the question whether the publication of a dumping duty notice sought in respect of the goods the subject of the application is justified, the ADA is to hold an inquiry into the matter and give to the Minister a report:

"(c) recommending whether any such notice should be published and the extent of any duties that are or should be payable under the Anti-Dumping Act in consequence of such notice;

(d) in particular recommending whether the Minister ought to be satisfied as to the matters in respect of which the Minister is required to be satisfied before such a notice can be published;

(e) recommending (where applicable) whether the Minister ought to give to the exporter of the goods a notice under subsections 269TG(4) or 269TJ(3) of the *Customs Act 1901*; and

(f) which shall include all reasons for any recommendations."

[emphasis added]

The provisions of para.7(1)(c) of the ADA Act in requiring that the ADA report recommend "the extent of any duties that are or should be payable" assumes that the implementation of anti-dumping measures under the legislation will result in the imposition of dumping duties commensurate with the "material injury" which an Australian industry has suffered "by reason of", or "because of", the dumping of the goods the subject of the ADA inquiry.

The same assumption underlies the enactment of sub-s.8(5A) of the Anti-Dumping Act (see Swan Portland Cement Ltd & Anor v. Minister for Science, Customs and Small Business & Anor (1989) 88 ALR 196 at 199), and s.10 of the ADA Act. Sub-section 8(5A) of the Anti-Dumping Act reads:

"(5A) In exercising his or her powers under subsection (5) in relation to dumping duty in respect of goods, the Minister shall have regard to the desirability of ensuring that the amount of dumping duty in respect of

> those goods is not greater than is necessary to prevent the injury or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TG(1)(b) or (2)(b) of the Customs Act, as the case requires."

Section 10 of the ADA Act reads:

> "10. Without limiting the matters to which the Authority may have regard in performing its functions and exercising its powers, the Authority shall, in performing its functions and exercising its powers, have regard to:
>
> (a) the Commonwealth Government's policy in relation to anti-dumping matters; and
>
> (b) Australia's obligation under the General Agreement on Tariffs and Trade;
>
> not to use the imposition of duties under the Anti-Dumping Act to assist import competing industries in Australia or to protect industries in Australia from the need to adjust to changing economic conditions."

The "material injury" to an Australian industry contemplated by sub-s.269TG(1) is material injury which is the consequence of the dumping of the goods that have been exported to Australia. Section 269TG is not concerned with detriment which the Australian industry under consideration may have suffered from causes other than dumping, for example declining demand due to economic recession, industrial unrest, or insufficient raw materials to permit the achievement of anticipated production output.

Where the Australian industry under consideration has suffered detriment from a number of causes, it will be necessary for the Minister to be satisfied that the industry has suffered detriment sufficient to meet the description "material injury" within the meaning of the legislation in consequence of the dumping of goods that have been exported to

Australia, and to quantitatively separate that material injury from detriment caused by other factors. Whether the Minister is so satisfied as to the first matter involves a matter of judgment and degree, and is a question of fact: see Wilcox J. in C.A. Ford Pty Ltd trading as Caford Castors v. The Comptroller-General of Customs and the Anti-Dumping Authority, unreported, judgment 8 March 1991. Understood in this way, it is correct to say, as counsel for the respondents submitted, that s.269TG requires that the "material injury" referred to must be caused solely by the dumping the subject of the inquiry. However, as the arguments which have been advanced in this Court demonstrate, the postulation of a "sole cause" test is apt to be misleading where the investigation of circumstances alleged to fall within s.269TG poses as a separate issue the question whether the relevant Australian industry has suffered detriment from any cause before considering whether the Australian industry has suffered, or may suffer, "material injury" within the meaning of the legislation, that is, material injury suffered "by reason of" or "because of" dumping.

It is convenient now to turn to the Reports of the ADA. The Reports are lengthy documents to which are attached several appendices including confidential pricing and market information. In Report No.38 under the chapter headed Material Injury the ADA expresses the following conclusions:

> "Customs found that domestic prices were below the estimated USP [unsuppressed selling price] and that the

subsequent loss of profits represented material injury.

As dumping was alleged to have commenced in early 1989 the Authority examined whether the industry had suffered material injury in 1989 and 1990.

The Authority notes that although sales by local producers fell in 1989, prices, although falling, remained high on average and profits and profitability declined only marginally. The Authority therefore cannot accept that the industry suffered material injury in 1989.

Average prices in 1990 were significantly below average prices in 1989. Costs to make and sell LDPE did not decline at the same rate. The industry suffered a fall in profits and profitability in 1990 even though the volume of sales increased.

The Authority accepts that compared to 1988 and 1989 the industry's performance in 1990 indicates that the industry suffered material injury in the latter year. However, it notes that in 1988 and 1989 the industry's performance was exceptionally good. A comparison of performance in 1990 with earlier years such as 1986 and 1987 indicates that the extent of injury suffered in 1990 may not be material.

Nevertheless the Authority accepts, on balance, that the industry did suffer material injury in 1990."

In the Summary to Report No.38 the ADA said:

"On balance - but only on balance - the Authority accepts that the industry did suffer material injury in 1990.

The Authority notes that imports (including imports from the ten countries under reference and six other countries alleged to be dumping) with significant dumping margins certainly held less than 10 per cent of the Australian market in 1990.

The Authority has difficulty in accepting that the industry suffered material injury as the result of imports that held such a small market share.

A number of other factors may have influenced the industry's performance in 1990. These factors include the relationship between Australian LDPE prices and those on foreign markets, the increasing utility of linear low density polyethylene, increased costs to make and sell LDPE and the general economic climate. Injury from these

factors should not be attributed to dumped imports.

In the Authority's view, these factors could reasonably be expected to have contributed substantially to the material injury suffered by the industry. It does not believe that the Minister should be satisfied that the dumped imports, of themselves, have caused material injury."

Report No.44 follows a similar format to Report No.38 and covers much of the same factual information. The following passages are taken from the chapter headed Causal Link:

"The Authority now finds itself assessing whether dumped imports from only six of these countries caused material injury.

The Authority has found that the industry suffered material injury only in 1990. In that year import penetration was lower than in the previous year with dumped imports (from all 16 countries) having significant dumping margins holding certainly less than 10 per cent of the market in 1990. The local industry increased its market share and remained profitable, albeit less so.

In 1990 imports from the six countries currently under inquiry held 3 per cent of the Australian market. Further, the Authority has found that some shipments from some of these countries were not dumped, or had a quite insignificant (less than five per cent) dumping margin.

...

The Authority also notes that in 1990 shipments from [3 of the countries] were small and of a 'one off' nature.

The Authority has difficulty in accepting that the import penetration achieved by these six countries (or for that matter the 16 countries) taken together is of sufficient magnitude to cause material injury to the Australian industry.

Therefore, the Authority is still of the view that the Minister should not be satisfied that dumped imports, of themselves, have caused material injury.

As noted earlier, ICI has commenced court action against the recommendations made by the Authority in its Report No.38 and against the Minister's subsequent decision to accept these recommendations. ICI, in its statement of

> claim, alleged that irrelevant factors should not have been taken into account, including:
>
> - the relationship between Australian LDPE prices and those on foreign markets;
> - the increasing use of LLDPE; (sic)
> - increased costs to make and sell LDPE; and
> - the general economic climate.
>
> ...
>
> The Authority remains of the view that these factors could reasonably be expected to have contributed substantially to the injury suffered by the industry.
>
> But the central question at issue before the Authority in this, as in any dumping inquiry, is whether dumped imports in their own right have caused or are threatening material injury. The Authority, as already noted, has difficulty in accepting that market penetration by dumped imports of such a small magnitude was sufficient to injure the Australian industry producing LDPE. The Authority cannot, therefore, conclude that dumping of itself has caused material injury."

Elsewhere in the Reports the ADA discusses at length factors other than dumping of LDPE which could have been causes of the Australian industry's poor performance in 1990, and the Summary to Report No.38 referred to four of them: (i) the relationship between Australian LDPE prices and those on foreign markets, (ii) the increasing utility of linear low density polyethylene, (iii) increased costs to make and sell LDPE, and (iv) the general economic climate. It is unfortunate that the ADA in discussing the overall performance of the Australian industry in 1990 and earlier years has used the expression "material injury". In doing so it has used that expression to describe a detriment which is not the detriment referred to in s.269TG. Had some neutral expression

been employed instead, the arguments which have been advanced in this Court might not have arisen.

As noted earlier in this judgment, the conclusion that, on balance, the Australian industry suffered "material injury" in 1990 is a conclusion that in 1990 the industry performed poorly and suffered a detriment. That conclusion says nothing about the cause of the detriment.

As a separate step in its process of reasoning the ADA then considers the question of causation, and expresses the further conclusion, appearing in the last sentence of that part of the Summary of Report No.38 set out above, that "it does not believe that the Minister should be satisfied that the dumped imports, of themselves, have caused material injury". This sentence is one of those relied on by the appellant as indicating error. The argument asserts that the expression "material injury" means all the detriment found, on balance, to have been suffered in 1990; and that the ADA was propounding the test that the dumped imports of themselves, that is solely, had to be the cause of all that detriment to enliven the Minister's power under s.269TG. It is in this sense that the appellant complains that the ADA erroneously adopted a "sole cause" test, as the preconditions of the section would have been fulfilled if any of the detriment, sufficient in degree to be "material injury", had been caused by dumping.

On a fair reading of the Report as a whole it is however clear that in the last sentence the ADA is using the expression "material injury" in its s.269TG meaning, and is not intending to refer globally to all the 1990 detriment discussed by it elsewhere in the Report.

The confusion caused by the use of the expression "material injury" in different ways is also apparent elsewhere in the Summary to Report No.38. The appellant complains that the last three paragraphs of that part of the Summary set out above, in particular the last paragraph, display a non sequitur in logic. The conclusion expressed in the last sentence - in effect that the dumped imports have not caused material injury - is said to be based on the premise which precedes it. It is contended that the conclusion cannot follow from the proposition that the four other factors mentioned "could reasonably be expected to have contributed substantially to the material injury suffered by the industry". Again the apparent error in logic is to be explained in part by the changing meaning to be attributed to the expression "material injury".

The three paragraphs of the Summary referred to above should be understood as directed to the matter of proof and the need for the Minister to be satisfied as to the facts on which the exercise of power under s.269TG is conditioned. The ADA in the Summary records its conclusion that, on balance, the Australian industry suffered detriment in 1990; it notes

the small market share of the 16 alleged dumpers; it expresses its difficulty in accepting that the industry suffered "material injury" in the statutory sense as the result of the dumping of imports holding a small market share; and then refers to four other causes which it considered could reasonably be expected to have contributed substantially to the industry's poor performance - thereby increasing the uncertainty whether the detriment suffered in 1990 had any relationship to the dumping. The conclusion should be understood as expressing the view that the available material is insufficient to satisfy the Minister that, within the meaning of s.269TG, the Australian industry suffered injury, sufficient to be characterised as "material injury", because of the dumping.

It is not necessary to set out each of the passages in the Reports which it is contended repeat the error expressed in the Summary to Report No.38. The alleged errors in the other passages are to be similarly explained and understood. It is sufficient to refer only to the concluding paragraph of the chapter headed Causal Link in Report No.44 where the ADA said:

> "But the central question at issue before the Authority in this, as in any dumping inquiry, is whether dumped imports <u>in their own right</u> have caused or are threatening material injury...The Authority cannot, therefore, conclude that dumping <u>of itself</u> has caused material injury."

The emphasis given to the words "in their own right" and "of

itself" indicate that the ADA was considering, correctly, whether detriment to the Australian industry had been caused by dumped imports as opposed to other factors. Once it is recognised that the expression "material injury" is used throughout the reports to mean either overall poor performance detriment suffered by the industry, or "material injury" in the s.269TG sense, depending on the context, the impugned passages do not reflect a misconstruction of s.269TG.

In the course of argument before this Court submissions were made as to the meaning of "material injury" in s.269TG. This expression is not defined, although as noted above, sub-s.269TAE(1) lists criteria to which the Minister may have regard in determining for the purposes of s.269TG (and s.269TJ) "whether material injury to an Australian industry has been or is being caused or is threatened or would or might have been caused, or whether the establishment of an Australian industry has been materially hindered, by reason of any circumstances in relation to the exportation of goods to Australia from another country". In Swan Portland Cement Ltd v. The Minister for Small Business and Customs, (1991) 28 FCR 135 at 144, Lockhart J. observed that the determination whether material injury of this kind has occurred. "...is essentially a practical exercise designed to achieve the objective of determining whether, when viewed as a whole, the relevant Australian industry is suffering material injury from the dumping of goods."

Section 12 of the ADA Act provides:

"12.(1) The Minister may give to the Authority such written directions in connection with carrying out or giving effect to the Authority's powers and duties under this Act as the Minister thinks fit, and the Authority shall comply with any directions so given.

(2) A direction under subsection (1) shall not deal with carrying out or giving effect to the powers of the Authority in relation to a particular consignment of goods or to like goods to goods in a particular consignment but shall deal instead with the general principles for carrying out or giving effect to the Authority's powers.

(3) Where the Minister gives a direction to the Authority, the Minister shall:

(a) cause a written notice setting out particulars of the direction to be published in the *Gazette* as soon as practicable after giving the direction; and

(b) cause a copy of that notice to be laid before each House of the Parliament within 15 sitting days of that House after the publication of the notice in the *Gazette*.

(4) A notice setting out particulars of a direction is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*."

Pursuant to these provisions, on 4 September 1990 the Minister gave a direction to the Authority which in part reads:

"Material Injury

The Authority shall ensure that it recommends that anti-dumping...action be taken only when dumping...has caused, or is threatening, 'material' injury to the Australian industry producing like goods - that is, injury which is not immaterial, insubstantial or insignificant; injury which is greater than that likely to occur in the normal ebb and flow of business.

The Government expects that material injury, or the threat thereof, will only rarely be taken as proven when the Australian industry producing like goods has not suffered, or is not threatened with, a 'material'

> diminution of profits or when the dumped...imports do not hold (or threaten to hold) a sufficient share of the Australian market to cause or threaten 'material' injury, in the sense in which 'material' is defined above. Nevertheless, the Government acknowledges that (rare) cases may occur in which material injury may indeed be caused or threatened even though the Australian industry's profits have not been 'materially' reduced and even though the dumped...imports hold only a small share of the Australian market.
>
> The Authority shall take the above comments to apply, adjusted as necessary to the circumstances of the case, when considering whether dumping...has 'materially' hindered the establishment of an Australian industry."

The Ministerial Direction binds the ADA in connection with carrying out or giving effect to its powers and duties under the Act. The content of those powers and duties however falls to be determined on a consideration of the language of the Act. The Ministerial Direction cannot, and does not purport to, modify the Minister's power arising under s.269TG. The preconditions to the exercise of that power are to be found in s.269TG, not in the Ministerial Direction. Nevertheless the meaning accorded in the Ministerial Direction to the requirement that injury to an Australian industry be "material" is one that accords with an ordinary meaning of the word "material", and with the context in which that word is used in s.269TG, in the complementary ss.269TH, 269TJ, 269TK, and in the related s.269TAE. It also accords with the meaning clearly revealed by the associated expression "materially hindered" in ss.269TG, 269TJ and 269TAE. That the word is used in a quantitative sense is borne out by the criteria to which the Minister may have regard in s.269TAE. In the context of the legislation "material injury" is injury

which is not immaterial, insubstantial or insignificant. In the practical application of that notion material injury will in most though not necessarily in all cases be injury which is greater than that likely to occur in the normal ebb and flow of business uninfluenced by dumping or other anti-competitive practices proscribed by the Customs Act.

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

Earlier in this judgment the use by the ADA in its Reports of the expression "material injury" to mean, depending on the context, either overall poor performance detriment suffered by the Australian industry under consideration, or "material injury" in the s.269TG sense, is described as unfortunate. It is not intended to imply any criticism of the steps in the process of reasoning undertaking by the ADA. The criticism relates only to the choice of language used by the ADA. In the course of considering whether the pre-conditions of s.269TG are fulfilled it can be anticipated, at least in most cases, that the ADA will investigate a wide range of performance indicators in the relevant industry, and if it is

thought that poor performance indicates that the industry has suffered detriment during a particular period, the ADA will investigate possible causes for the poor performance. There may be causes unrelated to the alleged dumping that explain the poor performance, at least to the extent that the ADA concludes that there is no evidence sufficient to satisfy the Minister that "material injury" within the meaning of s.269TG could have been caused because of dumping. In the present cases the Tribunal has considered the overall performance of the industry, and all matters which could have caused or contributed to the poor performance which was detected. Provided the ADA ultimately addresses the question which s.269TG poses, as it has done, namely whether material injury to the industry within the meaning of s.269TG has been or is being caused, or is threatened, because of the dumping alleged, the conclusion reached in this way will not involve error of law. By referring to poor performance in the industry we do so of course in the context of this case. We do not mean to suggest that it is only in the context of overall poor performance that material injury can occur.

It remains to refer to two passages in the judgment of the primary Judge from which this appeal is brought. In rejecting the contentions of the appellant, his Honour said:

> "I do not read the ADA as asserting or as having assumed that material injury to an Australian industry might be treated as having been caused because of dumping only if that activity were the sole or exclusive cause of <u>the</u> material injury. Rather, the ADA asked itself, looking at a range of factors, and as a matter of qualitative

> assessment, whether the dumping was of sufficient magnitude or seriousness to enable one to conclude that the material injury was caused because of it".

and

> "...the conclusion which is reached by the ADA is, in substance, that when regard is had to the cumulative effect of the various factors involved, the contribution of the dumped imports to the material injury to the Australian industry in 1990 was not sufficiently substantial a contribution to establish the necessary 'causal link' required by s.269TG. There was no error of law in reaching its conclusion in that way",
>
> [emphasis added]

It was on these passages that the appellant mounted its alternative argument that the primary Judge erroneously propounded a "substantial contribution" test.

The appellant contends that the repeated references to "the material injury" in these passages are references to the ADA's conclusion that the Australian industry suffered detriment in 1990. If this were the meaning intended, the passages give rise to difficulty as s.269TG does not require as a precondition to the exercise of the Minister's power that dumped goods exported to Australia be a contributing cause, a substantial cause, or the sole cause of all detriment suffered by the Australian industry during the period under consideration. Where the Australian industry has suffered detriment from a number of probable causes the section requires a determination whether there was separate material injury, or any material incremental injury (as to which see C.A. Ford Ltd trading as Caford Castors v. The Comptroller-General of Customs and the Anti-Dumping Authority, at 16-17),

caused by the dumping over and above detriment caused by other factors. We do not read the passages in the way in which the appellants contend, but it is not necessary to explore further the proper interpretation of his Honour's judgment as, for the reasons already given, the applications for orders of review must fail. The appeals are therefore dismissed. The appellant must pay the respondent's costs of the appeals.

I certify that this and the 30 preceding pages are a true copy of the Reasons for Judgment of the Court

Associate: J Churchill

Dated: 20/3/92

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Date of hearing	: 10 February 1992