JUDGMENT No. 882/1992

IN THE FEDERAL COURT OF AUSTRALIA )
)
NEW SOUTH WALES DISTRICT REGISTRY ) No NG242 of 1992
)
GENERAL DIVISION )

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN: ENICHEM ANIC S.r.l

First Appellant

ENIMONT AUSTRALIA PTY LTD

Second Appellant

AND: THE ANTI-DUMPING AUTHORITY

First Respondent

THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS

Second Respondent

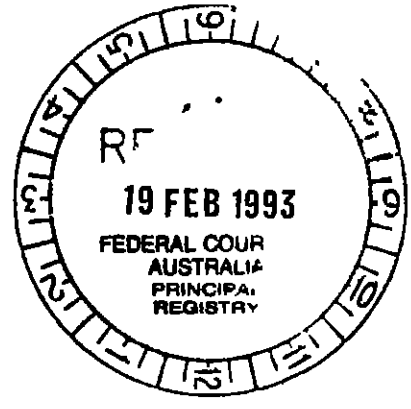
CORAM: GUMMOW, HILL & O'CONNOR JJ
PLACE: SYDNEY
DATED: 30 NOVEMBER 1992

CORRIGENDUM

Page 18, paragraph 2, line 5, replace *"s.269TA(2)"* with *"s.269TAC(2)"*.

Associate to Mr Justice Hill

18 February 1993



JUDGMENT No. 882 / 92

**CATCHWORDS**

**ADMINISTRATIVE LAW** - Administrative Decisions (Judicial Review) Act - failure to take into account a relevant factor - failure to inquire - review of Anti-Dumping Authority determination of *"normal value"* of goods exported to Australia - determination by reference to price of appellant's goods in Italy - whether appellant's *"natural monopoly"* in Italy relevant - whether submissions made by the appellant to the Authority placed duty upon Authority to inquire as to whether such a monopoly existed and the consequences thereof.

**ADMINISTRATIVE LAW** - Administrative Decisions (Judicial Review) Act - consideration of irrelevant factors - determination by Anti-Dumping Authority that imports threatened material injury to Australian industry - whether Authority erred in law by considering the aggregate effect of imports into Australia.

Customs Tariff (Anti-Dumping) Act 1975 (Cth): s.8

Customs Act 1901 (Cth): ss.269TG, 269TAC, 269TC

Anti-Dumping Authority Act 1988: s.7

Marine Power Australia Pty Ltd v Comptroller-General of Customs (1989) 89 ALR 561 at 570, approved.

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39, applied.

Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 at 169-70, approved.

Feltex Reidrubber Ltd v Minister for Industry and Commerce (1983) 46 ALR 171 at 186-7, discussed.

Swan Portland Cement Ltd v Minister for Small Business & Customs (1991) 28 FCR 135 at 144, approved.

ENICHEM ANIC S.r.l v THE ANTI-DUMPING AUTHORITY

No NG 242 of 1992

CORAM: GUMMOW, HILL & O'CONNOR J
PLACE: SYDNEY
DATED: 30 NOVEMBER 1992

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CORAM: GUMMOW, HILL & O'CONNOR JJ
PLACE: SYDNEY
DATED: 30 NOVEMBER 1992

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants to pay the respondents' costs.

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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ENIMONT AUSTRALIA PTY LTD
Second Appellant

AND: THE ANTI-DUMPING AUTHORITY
First Respondent

THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS
Second Respondent

CORAM: GUMMOW, HILL & O'CONNOR JJ.

PLACE: SYDNEY

DATE: 30 NOVEMBER 1992

REASONS FOR JUDGMENT

GUMMOW J:

I agree that the appeal should be dismissed with costs, for the reasons given by Hill J.

I certify that this page is a true copy of the Reasons for Judgment herein of the Honourable Mr Justice Gummow.

Associate: Michael Bray

Date: 30 November 1992

IN THE FEDERAL COURT OF AUSTRALIA )
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NEW SOUTH WALES DISTRICT REGISTRY ) No NG242 of 1992
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ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN: ENICHEM ANIC S.r.l

First Appellant

ENIMONT AUSTRALIA PTY LTD

Second Appellant

AND: THE ANTI-DUMPING AUTHORITY

First Respondent

THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS

Second Respondent

CORAM: GUMMOW, HILL & O'CONNOR JJ
PLACE: SYDNEY
DATED: 30 NOVEMBER 1992

REASONS FOR JUDGMENT

HILL J:

The appellants, Enichem S.r.l and EniMont Australia Pty Limited, appeal against the judgment of a judge of this Court (Davies J) dismissing an application brought by them under the provisions of the Administrative Decisions (Judicial Review) Act 1977 (Cth) for review of decisions made by the Anti-Dumping Authority (the first respondent) and the Minister of State for Small Business and Customs (the second respondent) which led to the imposition of anti-dumping duty on exports of sodium cyanide by the first applicant from Italy to Australia.

The decisions were described in the application as follows:

> *"1. The decision of the First Respondent set out in Report No. 40, June 1991, entitled 'Sodium Cyanide from the Federal Republic of Germany, Italy, Japan, Republic of Korea, United Kingdom and the United States of America', recommending that the Second Respondent take action resulting in the imposition of anti-dumping duty on the export of sodium cyanide from Italy to Australia by the First Applicant.*
>
> *2. The decisions of the Second Respondent, on or about 8 July, 1991:*
>
> *(a) that he was satisfied that the export price of the First Applicant's sodium cyanide was less than the normal value of that sodium cyanide and that this caused or threatened to cause material injury to an Australian industry producing like goods;*
>
> *(b) that he should impose anti-dumping duties against the First Applicant's exports of sodium cyanide from Italy to Australia; and*
>
> *(c) to publish notices in the Commonwealth of Australia Gazette of 17 July, 1991, declaring that S.8 of the Customs Tariff (Anti-Dumping) Act 1975 (Commonwealth) applies, thereby resulting in the imposition of anti-dumping duty on the First Applicant's exports of sodium cyanide from Italy to Australia."*

The statutory background

Dumping Duty, as it is called, is imposed by s.8(3) of the Customs Tariff (Anti-Dumping) Act 1975 (*"the Anti-Dumping Act"*). An outline of the legislative scheme and its relationship to Australia's international rights and obligations is to be found in the decision of the full court of this Court in ICI Australia Operations Pty Ltd v Fraser (1992) 106 ALR 257.

It is a condition precedent to the imposition of the duty on particular goods that there be in force a declaration made under s.269TG(1) or (2) of the Customs Act 1901 (*"the Customs Act"*). Before, however, a declaration can be made under s.269TG of the Customs Act, certain preconditions must be fulfilled as part of what Lockhart J outlined in Marine Power Australia Pty Ltd v Comptroller-General of Customs (1989) 89 ALR 561 at 570 as a:

> *"four stage procedure commencing with the dumping complaint and ending, where necessary, with the imposition of dumping duties."*

Generally speaking, the starting point for action being initiated, which may ultimately lead to dumping duty or countervailing duty being imposed, will be a complaint made under s.269TB, predicated on there being a consignment of goods either imported or likely to be imported into Australia

in circumstances where there has been, or may be established, an Australian industry producing like goods. That complaint which is in the form of an application lodged with the Comptroller of Customs requesting the Minister to publish a notice in respect of the goods, is then considered by the Comptroller under s.269TC. The Comptroller may either reject the application or alternatively publish a notice in the Gazette setting out certain matters as stipulated in s.269TC(4). The complaint procedure and the examination of the application by the Comptroller was discussed in the decision of the full court of this Court in Swan Portland Cement Ltd v Comptroller-General of Customs (1989) 25 FCR 523 (particularly at 524-5) and in the judgment in Midland Metals Overseas Ltd v Comptroller-General of Customs (1991) 30 FCR 87.

After publication of the notice referred to in s.269TC(4), the Comptroller is required to consider the application, taking into account any submissions that he has then received and other matters he believes to be relevant (s.269TD(1)). If, as a result of his consideration, he makes a preliminary finding that there are sufficient grounds for the publication of a dumping duty notice in respect of the goods, he then makes a declaration of the making of such a preliminary finding which is published in the Gazette and in a newspaper circulating in Australia.

The Comptroller may refer to the Anti-Dumping Authority, established by the Anti-Dumping Authority Act 1988, the question whether the publication of a dumping duty notice in respect of the goods is justified. The Authority is required by s.7 of that Act to hold an inquiry into the matter and within a period defined by the Act or Regulations to give to the Minister its 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 sub-sections 269TG(4) or 269TJ(3) of the Customs Act 1901."*

That report of the Authority must include *"all reasons for any recommendations"*: s.7(1)(f) of the Anti-Dumping Authority Act 1988. The Authority's report is directed to the Minister and is to be considered by him in determining whether dumping duty is to be imposed. The Minister's decision, which gives rise ultimately to the notice under s.8 of the Anti-Dumping Act, is made in accordance with s.269TG of the Customs Act, sub-sec.(1) of which provides:

*"Subject to s.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 s.42 in respect of any duty that may become payable on the goods under s.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 s.8 of that Act applies to those goods."*

The provisions of s.269TAC, so far as they are relevant to the present appeal, are as follows:

*"(1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.*

*(2) Subject to this section, where the Minister:*

*(a) is satisfied that:*

*(i) by reason of the absence of sales that would be relevant for the purpose of determining a price under subsection (1); or*

*(ii) by reason that the situation in the relevant market is such that sales in that market that would otherwise be relevant for the purpose of determining a price under subsection (1) are not suitable for use in determining such a price;*

*the normal value of goods exported to Australia cannot be ascertained under subsection (1)*

...

*the normal value of the goods for the purpose of this Part is:*

*(c) except where paragraph (d) applies, the sum of:*

*(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and*

*(ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export:*

*(A) such amounts as the Minister determines would be the delivery charges and other costs necessarily incurred in that sale; and*

*(B) subject to subsection (13), an amount calculated in accordance with such rate, if any, as the Minister*

*determines would be the rate of profit on that sale; or*

*(d) where the Minister so directs, the price determined by the Minister to be representative of the price paid for like goods sold in the ordinary course of trade in the country of export for export to a third country, being sales that are arms length transactions.*

...

*(4) Subject to subsections (6) and (8), where the Minister is satisfied that it is inappropriate to ascertain the normal value of goods in accordance with the preceding subsection because the Government of the country of export:*

*(a) has a monopoly, or substantial monopoly, of the trade of the country; and*

*(b) determines or substantially influences the domestic price of goods in that country;*

*the normal value of the goods for the purposes of this Part is to be a value ascertained in accordance with whichever of the following paragraphs the Minister determines having regard to what is appropriate and reasonable in the circumstances of the case:*

...

*(8) Where the normal value of goods exported to Australia is the price paid for like goods and that price and the export price of the goods exported:*

*(a) relate to sales occurring at different times; or*

*(b) are not in respect of identical goods; or*

*(c) are modified in different ways by taxes or the terms or circumstances of the sales to which they relate;*

> *that price paid for like goods is to be taken to be that price paid adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price."*

The final step in the imposition of dumping duty is the imposing of the duty itself under s.8 of the Anti-Dumping Act. Sub-section (4) of that section sets the dumping duty payable in respect of goods as 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. The export price of the goods is determined under s.269TAB of the Customs Act and essentially, in the case of arms length transactions, will be the purchase price of the goods excluding the cost of exporting those goods to Australia.

The facts involved in the present appeal

Following upon complaints being made and, presumably, the publication of a notice under s.269TC(4), an investigation was made by a Ms Fisher, an officer in the Australian Embassy in Brussels, into, inter alia, the normal price at which sodium cyanide was sold by the first appellant in Italy. Ms Fisher had the advantage of conferences that took place in Milan and at which representatives of the appellant attended. A submission was made by the appellant and accepted by Ms Fisher that the market in Italy was completely different to that in Australia, in that the first

appellant sold to small users in the electro-plating, fine chemicals and pharmaceutical industries in Italy, whereas in Australia it sold mainly to large users in the gold-mining industry.

There were claims made, by the appellants, that the Australian producers had an advantage in marketing due to their ability to ship sodium cyanide in plastic lined wooden boxes of a capacity 700 - 1,000 kilograms. This allowed the mining companies very efficient utilisation of sodium cyanide in terms of storage, usage and disposal of the containers and provided a price advantage to the Australian industry. Ms Fisher recorded a submission that it was inappropriate to examine sales in the Italian domestic market and to compare them to export sales to Australia as the Italian sales were for different end users, in different quantities and shipment sizes and the European market was completely different to that in Australia.

Ms Fisher, in her report, considered none of these arguments sufficiently compelling to eliminate from consideration the sales in Italy on the basis that they were not suitable or relevant. She recommended also that adjustments be made to the Italian price, pursuant to the provisions of s.269TAC(8), to take into account, inter alia, packaging differences. She recommended, however, that no adjustments be made for the quantity and shipment size

differences between Australia and Italy or the fact that there were different end users of the product by purchasers in Italy and Australia. She arrived at a recommendation for the *normal value* of exports of sodium cyanide by the first applicant, which she said was based on s.269TAC(1) of the Customs Act.

It would seem that Ms Fisher's report was studied by the second appellant in Australia and its solicitors who prepared an initial submission which was subsequently supplemented in response to the preliminary finding by the Australian Customs Service based presumably on Ms Fisher's report. The submission was that there had been fundamental errors made, especially (for present purposes) in the manner of calculation of *normal value* under s.269TAC. Under the heading *"Normal Value"*, the solicitors set out reasons why it was said that the report erred in assessing *normal value*. These included the fact that sales in Italy were small, that they were to the electro-plating industry and pharmaceutical industries rather than to the gold industry and that cost structures and marketing practices were different in Italy to those prevailing in the gold-mining industry in Australia. The submission included the following comment:

> *"In Italy there is a natural monopoly in relation to sales to the electro-plating and pharmaceutical industries resulting from licencing* [sic] *and legal stock holding restrictions in relation to the product. Accordingly, EniMont is able to achieve a higher return than would*

*otherwise be available in the domestic market."*

The submission continued that domestic selling price could not be used to assess *normal value* if the market conditions were not such that a fair comparison could be made. It was said in the circumstances of the present case that it was not open to customs to adopt the domestic Italian price for the purposes of assessing *normal value*.

Although some matters in the initial submission were subsequently expanded by the solicitors for the appellants, nothing in the expanded submission affected the argument put before us.

In June 1991, the first respondent produced its report (Report Number 40) into the alleged dumping of sodium cyanide exported from Germany, Italy, Japan, Korea, United Kingdom and the United States. That report noted that a United States company (EI Dupont de Nemours & Co (Inc)) was the largest exporter of sodium cyanide to Australia. A dumping margin of two percent had been found to have been applied by this company during one month only and although that company supplied sodium cyanide at low prices to Australia, other shipments made by it were found not to have been dumped. Imports from other sources under enquiry held approximately 36 percent of the market in 1990.

The Authority noted:

> *"that significant dumping margins were assessed for imports from other sources. Future imports at these dumped prices are likely to undercut the prices of the local industry and as a result Australian prices are likely to be suppressed and depressed.*
>
> *It is likely that as a result the industry will record substantial financial losses."*

The Authority concluded that if anti-dumping action were not taken, imports at dumped prices were likely to cause material injury to the Australian sodium cyanide industry and that sodium cyanide had been exported from Germany, Italy, Japan, Korea, the United Kingdom and the United States at dumped prices. It recommended to the Minister that there be published a dumping duty instrument under s.269TG(2) of the Customs Act against a number of exporters including the first appellant.

The Authority in its report referred to the calculation of *normal value* recognising, correctly, that s.269TAC of the Customs Act gave several methods by which this might be obtained, with the choice of method being determined by the circumstances of the case. Dealing with the facts, the Authority said, inter alia:

> *"5.4 The Authority's Assessment of Normal Values*

*Except in the case of the USA, sodium cyanide is not sold in domestic markets of the countries under inquiry for use in gold extraction. In these countries sodium cyanide is mainly used in the chemicals industry and electroplating.*

*Some parties suggested that such sales are not relevant for the purposes of subsection 269TAC(1) and that other approaches to assessing normal values should be used.*

*The Authority notes that subsection 269TAC(1) does not include a test concerning differences in the domestic and export marketing of the product. Rather the tests focus on whether the sales are in the ordinary course of trade and at arms length.*

*Where the terms and circumstances of domestic and export sales differ and prices are affected, subsection 269TAC(8) requires adjustments to be made to account for these differences.*

*Therefore, where the Authority is satisfied that domestic sales meet the tests imposed in subsection 269TAC(1), it has used this subsection together with adjustments under subsection 269TAC(8) to assess normal values.*

...

*Customs conducted inquiries at the premises of each exporter to verify information contained in submissions. Customs considered all the normal values should be assessed under subsection 269TAC(1) - with adjustments, where appropriate, made under subsection 269TAC(8).*

*The Authority received further submissions from the exporters. It agrees with Customs' determination that for all the countries under inquiry subsection 269TAC(1) was appropriate to assess normal values with the relevant adjustments made to domestic selling prices under subsection 269TAC(8) to enable comparison with export prices."*

The Authority set out adjustments made under s.269TAC(8) which in the case of the goods of the appellants included differences in freight, delivery charges, packing and credit terms.

The Authority found dumping margins for all countries under review. In the case of Italy these were between 34 and 54 percent.

In considering the threat to the Australian industry, the Authority looked at the various exporters into Australia collectively, noting that so viewed they held a large part of the market in 1990. The Authority noted that the dumping margins were significant, but concluded that imports with significant dumping margins could be expected to have a major influence on the future performance of the Australian industry. Accordingly, the Authority recommended to the Minister that anti-dumping action be taken against exporters of sodium cyanide from all the countries under inquiry, with the exception of the United States of America.

The Minister, in his statement under s.13 of the Administrative Decisions (Judicial Review) Act 1977 relevantly asserted that he had ascertained the adjusted *normal value* for sodium cyanide in Italy pursuant to sub-secs.269TAC(1) and (8). He said that the sales by the first appellant were in the ordinary course of trade and at arms length and that they

had been used to determine *normal value* under s.269TAC(1) but adjusted for differences in freight, delivery charges, packing and credit terms pursuant to s.269TAC(8). The Minister considered the threat of a material injury to the Australian industry and expressed himself to be satisfied that there was a threat from dumped imports of sodium cyanide other than that emanating from the United States of America. He relied, in the conclusions which he reached, upon the report of the first respondent. In the result he concluded that he should impose anti-dumping duties against exports of sodium cyanide from Italy. He made a declaration under s.269TG(1) of the Customs Act accordingly.

The proceedings before Davies J

The respective decisions were challenged in the Court below by the appellants on a number of grounds, most of which were not pressed before us.

His Honour expressed the view that the material before the court disclosing what matters were taken into account by the respondents was so limited that he could not conclude that it was not open to the respondents to proceed as they did. In particular, his Honour was of the view that there was no material before the Court which required the respondents to determine that the Italian domestic price was

not a suitable price for the purposes of s.269TAC. His Honour said:

> *"In the light of the report prepared by Ms Fisher, it has not been established that the respondents committed an error in law by adopting the Italian domestic price under s.269TAC(1) and adjusting it in accordance with s.269TAC(8)."*

His Honour also considered a submission that the respondents had erred in considering the question of the threat of material injury to Australian industry by reference to all exports (other than the United States exports) rather than the effect on Australian industry caused by a particular exporter. On this matter his Honour said:

> *"However, I do not see that there was any error of law in the approach taken by the Anti-Dumping Authority and by the Minister. As I have earlier mentioned, the inquiry was an inquiry into dumping by many countries and the Minister's declaration referred to exports from several countries. In the circumstances, it would seem impractical to do otherwise than to look at the effect overall of dumping on Australian industry. It is the sale to Australia of goods at dumped prices that causes the harm. The sales by EniMont may have amounted to less than 3% of the overall sales in Australia but it is not shown that they were insignificant. I agree with the remarks of Sheppard J in Feltex Reidrubber Ltd v Minister for Industry and Commerce (1983) 46 ALR 171 at 186-7. See also ICI Australia Operations Pty Ltd v Fraser."*

It was from this decision that the appellants appeal.

The submissions

Before us the appellants limited themselves to what were in essence two submissions, one of which was stated in a number of different ways. The first submission of the appellants was that each of the respondents had erred in law in applying s.269TAC(1) rather than finding that s.269TA(2) applied and did so because of a failure to take into account as a relevant matter the fact that the first appellant had in Italy a *natural monopoly* which enabled it to achieve, in Italy, a higher return than would otherwise have been available in a domestic market. The same submission was put in the guise of an alleged failure to afford natural justice, but counsel for the appellants conceded that in essence the submission amounted to no more than saying that there had been a failure on the part of the respondents to take into account the existence of the *natural monopoly* said by the appellants to be a relevant matter.

The second submission made by the appellants was that the respondents had erred in law by considering the aggregate effect of imports from all sources into Australia when determining the question of the existence of a threat to Australian industry, rather than considering whether the

exports into Australia of the applicants viewed alone posed a threat to the Australian industry.

It is convenient to consider each of these submissions separately.

The failure to take into account the existence of the appellant's *natural monopoly*.

As already set out, the appellants had, in the course of submissions made through their solicitors, made the point that the domestic sales in Italy should not be taken into account in determining the *normal value* because of the existence in that country of a *natural monopoly*. By *"natural monopoly"* was meant, apparently, that the first appellant was the only supplier in the Italian market of sodium cyanide and that this came about because Italian regulations for licensing, legal use and stockholdings were such as to deter, as a matter of practice, any other competitor entering into the market. The submission suggested that this had the result of affording to the first appellant a higher return than would otherwise have been available to it in Italy. No specific information was provided to support the submission and in particular no information was given which would permit a conclusion to be drawn as to what price, if any, the first appellant would have sold the goods in the Italian market if it had not had this so-called *"natural monopoly"*.

There can be no doubt that a failure to take into account a relevant matter is a reviewable error for the purposes of the Administrative Decisions (Judicial Review) Act: s.5(2)(b). As pointed out by Mason J in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39, the question of what a decision-maker is bound to take into account is a matter to be determined by construing the statute in question. If the statute itself does not expressly list the matters to be taken into account then they must be determined *"by implication from the subject matter, scope and purpose of the Act"* (at 39-40). Further, not every consideration which the decision-maker failed to take into account would justify the court setting aside the decision. A consideration might, as Mason J pointed out (at 40), be so insignificant that the failure to be taken into account could not have materially affected the decision.

When one turns to s.269TAC it is evident that the general principle for determining the *normal value* of goods is to be found in sub-sec.(1) of that section. The assumption upon which that sub-section is framed is that sales made by the exporter (if there be such sales) in its home country, if arms length, will be the best indication of the *normal value* of goods. However, as sub-sec.(2) makes clear, there will be cases where the prima facie position as set out in sub-sec.(1) will not give a true *normal value* of goods. One such reason, as dealt with in para.(a) of sub-sec.(2) is the absence of

sales in the country of export that are arms length sales. Obviously if there are no sales at all, no figure could be arrived at under sub-sec.(1). Similarly, if there were sales but there were no arms length sales, the same difficulty would arise.

Another case where sub-sec.(1) is not to be applied is where there is something about the situation in the relevant market which brings about the conclusion that arms length sales in that market are nevertheless *"not suitable for use"* in determining the price. An obvious example is where there is some factor which so distorts the market that arms length transactions made in the ordinary course of trade are rendered unsuitable to give the true *normal value* in the country of export. Two examples of such a case are to be found in sub-sec.(4) of s.269TAC, namely the existence of a government monopoly of the trade, or the existence of government control of the domestic price of the goods.

Counsel for the respondents submitted that s.269TAC established a hierarchy of measures of *normal value* of which the primary measure was s.269TAC(1). With this there can be little dispute. She submitted that where s.269TAC(1) applied, then s.269TAC(8) could be used to enable adjustments to be made to permit a proper comparison with export price. These submissions suggested that any problem brought about by the allegation of the existence of the monopoly of the first

appellant had been solved by the use of s.269TAC(8). That is not so. On its face there is nothing in the report of the first respondent which suggests that any adjustment was made to take account of the so-called *"natural monopoly"*.

The submissions continued by asserting that the suitability to which s.269TAC(2)(a)(ii) refers is suitability for use in determining a price that permits a proper comparison with export price. It was said that sales were not unsuitable where they were capable of adjustment under s.269TAC(8). That may well be so, but the submission leaves unanswered the question in what circumstances it will be possible to make adjustments under s.269TAC(8) in a case falling within s.269TAC(2)(a)(ii). It is not necessary, or indeed desirable, to determine in the present case whether it would be possible, in a case where the existence of a monopoly distorted a market, to take that matter into account under s.269TAC(8). Much may depend upon the type of distortion.

We were referred to the discussion on dumping in *"Anti-Dumping and Anti-Subsidy Law: The European Communities"* Beseler and Williams, London, Sweet and Maxwell, 1986, Ch.4. In that chapter the authors discuss the economic concept of dumping and its relationship to the overall theory of monopoly and imperfect competition. The discussion suggests that it is necessary for the seller to have a certain degree of monopoly power in one of the markets for price discrimination to

operate. That may be so, but it does not follow from the economic theory behind dumping that the existence of a monopoly situation in the country of export will not operate to distort the market operating in that place. Nor does it follow, as a matter of law, in the construction of the Australian legislation, that the prices charged in the place of export in arms length transactions where a monopoly distorts the market must necessarily be taken as the normal price, a result which Beseler and Williams suggest is accepted in countries of the European Economic Community (see note 59 to para 4.2.3.3.).

Notwithstanding the comments of Beseler & Williams, it was conceded by the respondent that the existence of a (non-government) monopoly could be a relevant matter in determining whether domestic prices in the country of export were suitable for use for the purposes of sub-sec.(1). Clearly enough a question of fact would be involved. The mere existence of a monopoly might, but need not, lead to a distortion of the market price. A monopolist might promote competition in the market under consideration, or might set the price in the domestic market by reference to arms length prices elsewhere. In either of those cases, the mere existence of the monopoly would not make the domestic prices unsuitable for use for the purposes of s.269TAC(1) of the Customs Act.

Counsel for the respondents submitted that it was not sufficient that the appellants draw the attention of the respondents to the fact that the first appellant had a *"natural monopoly"*. That expression was but a label. Rather, it was for the appellants to make out a case to the respondents that the existence of the monopoly had some effect on the relevant market which made the prices in Italy unsuitable for use. All that the appellants had done, in the present case, was to assert the existence of a *natural monopoly* and refer to the higher return which had been yielded in consequence. Although the appellants, in their submission, had stated that market conditions in Italy were such that no fair comparison could be made, this assertion was not developed further.

In the present case, the first respondent was bound to make recommendations as to the *normal value* to be adopted. In so doing, the first respondent was bound to take into account the existence of all matters relevant and bound indeed to give reasons for the ultimate recommendations made. This obligation is to be found, as has already been noted, in s.7(1)(f) of the Anti-Dumping Authority Act 1988.

Decision-making is a function of the real world. A decision-maker is not bound to investigate each avenue that may be suggested to him by a party interested. Ultimately, a decision-maker must do the best on the material available

after giving interested parties the right to be heard on the question. In the present case, an on-the-spot investigation had been carried out in Italy through a series of interviews at which representatives of the appellants were present. It would seem further interviews were held in Australia and the appellants given the opportunity to put submissions, an opportunity which they took. The paragraph in question was one small paragraph in some eleven pages of submissions to which were attached annexures. At best it did no more than assert the existence of a monopoly but fell short of indicating in what respects the market in Italy was affected by the existence of the monopoly so as to make the Italian price for the goods unsuitable to be used to fix the *"normal price"*.

In Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 at 169-70, Wilcox J, in the context of reasonableness, said:

> *"The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make inquiries."*

See too the judgment of the full court in J. Wattie Canneries Ltd v Hayes (1987) 74 ALR 202 at 215-7. It follows that the first respondent did not fail to take into account a

relevant matter because in the circumstances of the present case it had no obligation to pursue further the assertions made by the applicants as to the *natural monopoly* existing in Italy.

Did the respondents err in law by considering the aggregate effect of imports into Australia?

Section 269TG of the Customs Act makes it a precondition to a declaration that s.8 of the Anti-Dumping Act applies that the Minister be satisfied that there is a causal link between the fact that there is a difference between the export price into Australia and the *"normal value of the goods"* on the one hand and the causing of damage to an Australian industry or the threatened damage to that industry on the other.

In the simple case where one exporter ships to Australia goods at a low price, that causal link, if made out, will ordinarily be easy to demonstrate. Where there is more than one exporter, the situation is arguably more complicated. The problem is well illustrated by the facts of the present case.

According to a confidential attachment to the Report of the Anti-Dumping Authority, the total market share of Australian producers was 23.34 percent. Exports into Australia from the United States amounted in 1990 to 35.73

percent, which exports were considered not to have involved dumping, other than for a short time. Exports from the appellants in the same year had a market share of only 2.69 percent. The second appellant was not generally a price leader and its prices were, in the period 1 July 1989 to 30 June 1990, on average, higher than the prices charged by the United States exporters. However, in the period 1 July 1990 to 31 December 1990 the Italian price dropped below that of the United States.

It was said that, given the small market share held by the second appellant, it could not be said that it was the importation by the second appellant of sodium cyanide which was causing injury to the Australian producers, or threatening such injury. Such injury or threat might be caused by some other exporter into Australia, for example, from the United States, or perhaps Korea. It was said to be a mistake to take all exporters said to be exporting dumped goods to Australia and to consider them as a class, when the focus of the legislation was on the damage or threat of damage brought about by the exports into Australia of particular goods by a particular exporter.

A similar argument was rejected by Sheppard J in Feltex Reidrubber Ltd v Minister for Industry and Commerce (1983) 46 ALR 171 at 186-7, essentially on the ground that any

other view would leave a very large loophole in the legislation.

Such strength as there is in the argument is to be found in the undoubted fact that s.269TG(1) refers to particular goods, that is to say the goods of the particular manufacturer, and that the provisions of s.8 of the Anti-Dumping Act operate to charge the dumping duty upon the particular goods to which that section applies by force of the declaration made under s.269TG(1). That this is so is reinforced by the fact that the amount of the duty is equal to the difference between the export price of the particular goods and the *normal value* of the same goods. Once this is accepted it is but a short step, so it was submitted, to a conclusion that the causal link required by the terms of s.269TG(1) is between the individual exporter into Australia and the damage or threatened damage to the Australian producers.

The *"loophole"* to which Sheppard J referred is demonstrated by an example given by his Honour at 186-7. His Honour postulates that a supplier to the market with 25 percent of the market might alone have power to damage or threaten damage to the Australian suppliers in that market, but that one of five suppliers, each with 5 percent, on its own might not have that power. However, it would not follow from this that dumping action could not be taken against each

of the five suppliers. The reason is quite simple. In a case where the five suppliers viewed together would damage or threaten the Australian suppliers, the action of each of those suppliers, in exporting at dumped prices to Australia, may be said to damage or to threaten damage to the Australian suppliers. The determination of causation, like the determination of the existence of *"material injury"*, is, to use the words of Lockhart J in Swan Portland Cement Ltd v Minister for Small Business and Customs (1991) 28 FCR 135 at 144:

> *"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."*

A case may arise where the percentage of the market held by a particular exporter is so insignificant that to reach a conclusion of causality would be irrational, having regard to the percentages held by other exporters who are dumping goods into Australia. In such a case, a finding of causality would necessarily fail. But that is not the present case. Here, the exporters found to be dumping goods were aggregated and the combined effect of their dumping was considered by the decision-makers in resolving the question of damage or threatened damage to Australian producers. That approach of itself involved no error of law. The percentage of the market held by the goods of the appellants was not

insignificant. The finding of causality was not unreasonable and it has not been shown that there was any error of law involved.

In these circumstances the appeal must be dismissed and the appellants must pay the respondents' costs of it.

I certify that this and the preceding twenty-nine (29) pages are a true copy of the Reasons for Judgment herein of his Honour Mr Justice Hill.

Associate: Daniel O'Connor

Date: 30 November 1992

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|---|---|
| Counsel and Solicitors for Appellant: | R.A. Conti QC with C.P. Comans instructed by Sly and Weigall |
| Counsel and Solicitors for Respondent: | M. Beasley QC with S. Gageler instructed by the Australian Government Solicitor |
| Date of Hearing: | 14 September 1992 |
| Date Judgment Delivered: | 30 November 1992 |

IN THE FEDERAL COURT OF AUSTRALIA )
)
NEW SOUTH WALES DISTRICT REGISTRY ) No G242 of 1992
)
GENERAL DIVISION )

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN: ENICHEM ANIC S r.l
First Appellant

ENIMONT AUSTRALIA PTY LTD
Second Appellant

AND. THE ANTI-DUMPING AUTHORITY
First Respondent

THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS
Second Respondent

CORAM: GUMMOW, HILL & O'CONNOR JJ
PLACE: SYDNEY
DATED: 30 NOVEMBER 1992

REASONS FOR JUDGMENT

O'CONNOR J·

I agree with orders proposed by Hill J and with his reasons for them.

I certify that this page is a true copy of the Reasons for judgment herein of her Honour Justice O'Connor

Date: 30 November 1992

..... G. Iannotti
Associate