CATCHWORDS

CUSTOMS - Anti-Dumping - *"normal value"* - suitability of sales price - whether decision-maker bound to investigate assertions of oligopoly in the market - whether existence of oligopoly rendered prices unsuitable; whether Authority entitled to cumulate exports.

CUSTOMS - Anti-Dumping - Notice published by Minister - whether Minister obliged to consider whether utility in imposing dumping duties before publishing notice - whether essential that Report of Authority contain recommendations of matters of which Minister required to be satisfied.

ADMINISTRATIVE LAW - natural justice - whether procedural fairness required that applicants entitled to put submissions to Minister.

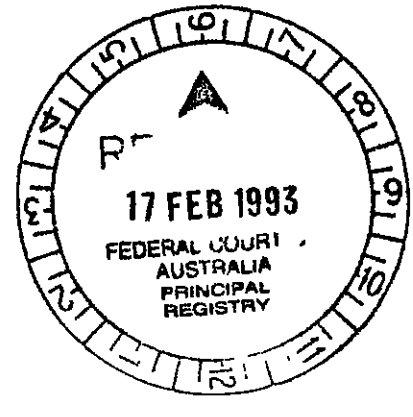
Customs Act 1901: ss.42; 269TAC(1), (2); 269TB; 269TC(4); 269TD(2)(b).
Administrative Decisions (Judicial Review) Act 1977: s.13.
Customs Tariff (Anti-Dumping) Act 1975: s.8.
Anti-Dumping Authority Act 1988: ss.7, 10.

Enichem Anic S.r.l. v Anti-Dumping Authority (First Instance, unreported, 9 April 1992; Full Court, unreported, 30 November 1992); applied.
C A Ford Pty Ltd v Comptroller-General of Customs (1992) 25 ALD 275; discussed.
Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24; applied.

HYSTER AUSTRALIA PTY LTD & ANOR v THE ANTI-DUMPING AUTHORITY & ORS

No NG 476 of 1992

CORAM: HILL J
PLACE: SYDNEY
DATED: 17 FEBRUARY 1993



IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No G476 of 1992
)
GENERAL DIVISION)

BETWEEN: HYSTER AUSTRALIA PTY LIMITED

First Applicant

HYSTER EUROPE LIMITED

Second Applicant

AND: THE ANTI-DUMPING AUTHORITY

First Respondent

THE MINISTER OF STATE FOR SMALL BUSINESS, CONSTRUCTION AND CUSTOMS

Second Respondent

CLARK EQUIPMENT AUSTRALIA PTY LIMITED

Third Respondent

CORAM: HILL J
PLACE: SYDNEY
DATED: 17 FEBRUARY 1993

MINUTES OF ORDER

THE COURT DIRECTS THAT:

The applicants bring in short minutes of order to give effect to this judgment on a date to be fixed with counsel.

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

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First Applicant

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THE MINISTER OF STATE FOR SMALL BUSINESS, CONSTRUCTION AND CUSTOMS

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CLARK EQUIPMENT AUSTRALIA PTY LIMITED

Third Respondent

CORAM: HILL J
PLACE: SYDNEY
DATED: 17 FEBRUARY 1993

REASONS FOR JUDGMENT

This case was heard, at the request of the applicants, immediately following the case of Powerlift (Nissan) Pty Limited v Minister of State for Small Business, Construction and Customs, albeit that the two cases had little in common, save that both concerned anti-dumping duty levied upon forklift trucks. The present case concerned forklift trucks imported from the United Kingdom; Powerlift (Nissan) concerned forklift trucks imported from Japan.

The first applicant in this case, Hyster Australia Pty Limited (*"Hyster"*), imports into Australia forklift trucks from the United Kingdom for sale to its distributors and customers in Australia. It seeks judicial review of the decision of the second respondent, the Minister of State for Small Business and Customs (*"the Minister"*), to impose dumping duties on certain forklift trucks exported to Australia from the United Kingdom and the decision of the first respondent, the Anti-Dumping Authority (*"the Authority"*), to recommend to the Minister that certain instruments be executed by him, including instruments under ss.269TG(1) and (2) of the Customs Act 1901, (*"the Act"*). Also the subject of review were the decision of the Minister to accept the Authority's recommendation and certain conduct allegedly proposed to be engaged in by the Minister. These additional matters involve no different issue than the two decisions first referred to and need not be further referred to. Clark Equipment Australia Pty Limited (*"Clark"*), an Australian manufacturer of forklift trucks and the company which originally complained about the dumping of forklift trucks, inter alia, from Japan and the United Kingdom, applied to become and became a party to the present proceedings as a person clearly interested in them.

On 21 August 1991 the Australian Customs Service (*"ACS"*) initiated inquiries into normal value, export prices and material injury to the Australian industry, threat of such

injury and link to dumping in respect of certain forklift trucks exported from Japan. The full history of these and prior inquiries into the dumping of forklift trucks exported from Japan is dealt with in the judgment in Powerlift Nissan. Suffice it to say here that this August 1991 inquiry followed the making of consent orders in this Court requiring the ACS to consider according to law an application for dumping duties lodged in April 1987 by Clark. Clark was, at that time at least, the sole known Australian manufacturer of forklift trucks. ACS Dumping Report No 91/23 entitled *"Report of Inquiry Into The Allegation of Dumping of Forklift Trucks from Japan"*, published in December 1991, was the immediate outcome of that inquiry.

In the meantime, an anti-dumping complaint had been lodged on or about 11 July 1991 by Clark, pursuant to s.269TB of the Act, for the imposition of anti-dumping duties against exports of forklift trucks from Northern Ireland and the United Kingdom. On 19 December 1991 a delegate of the Comptroller-General of Customs made a preliminary finding, pursuant to s.269TB(2) of the Act, that there were reasonable grounds for the publication of a dumping duty notice in respect of certain forklift trucks exported from the United Kingdom. That preliminary finding is to be found in ACS Dumping Report No 91/22. In it, the ACS concluded that there had been export to Australia of certain forklift trucks at dumped prices and that because of that dumping material injury

had been suffered by the Australian industry. The ACS found also that it would be appropriate to take securities under s.42 of the Act on certain forklift trucks entered for home consumption on or after 19 December 1991, in respect of any dumping duty that may become payable on trucks from the United Kingdom.

Hyster had lodged with the Director of Dumping Operations its submissions arguing against the imposition of dumping duties on United Kingdom exported forklift trucks on 30 September 1991. Information supplied by Hyster to the ACS showed a considerable discrepancy between the profit margins on sales in the United Kingdom and the profit margin on sales for the United States. For the purposes of this case, the parties agreed that the prices for forklift trucks and the profit margins applicable in the United Kingdom were substantially greater than those for the United States.

On or about 10 January 1992, pursuant to s.269TD(2)(b) of the Act, the delegate of the Comptroller-General referred to the Authority the question whether publication of dumping duty notices was justified. Accordingly, the Authority published a notice on or about 21 January 1992 notifying interested parties that it was conducting an inquiry into that question. The Authority completed its inquiries and in May 1992 published its report, *"Forklift trucks from the United Kingdom"*, ACS Dumping Report

No 71, May 1992. In that Report, the Authority recommended that the Minister publish instruments under ss.269TG(1) and (2), imposing dumping duty on exports of certain forklift trucks from the United Kingdom.

The Report noted that the review of the Japanese position had been completed and that the Minister had accepted the finding of the ACS that certain forklift trucks from Japan had been dumped, that Clark had suffered material injury and that the exports had caused that injury. On 11 March 1991, there was thus published in the Commonwealth Gazette a notice, under s.269TG(2) of the Act, imposing dumping duties on certain forklift trucks from Japan. As the Authority indicated in its Report, the publication of that notice indicated that the Minister had determined that exports of forklift trucks from Japan had caused or were threatening material injury to Clark.

In the Report, the Authority indicated that it had examined the circumstances surrounding sales in the United Kingdom market. In Part 5 *"Normal Values"* it stated (at para.5.2):

> *"Hyster Europe claimed that prices in the UK market were artificially high because of voluntary export restraints exercised by Japanese manufacturers. It argued that because these manufacturers limited their exports to the UK market the UK price was higher than it would otherwise be in a truly competitive market. Hyster Europe*

further argued that because UK prices were artificially high they were not in the ordinary course of trade and unsuitable for the determination of normal values under subsection 269TAC (1).

Hyster Europe requested that normal values be assessed under subsection 269TAC (2)(c) and supplied the relevant costing information to Customs.

The Authority has examined the circumstances surrounding sales in the UK market. It does not consider that imperfect market conditions are sufficient grounds to ignore domestic prices for the purpose of assessing normal values. If the domestic market is protected by high tariffs, import quotas or other regulations, sales in that market may still be in the ordinary course of trade. The GATT code and Australian legislation make no reference to imperfect market competition as a reason for sales not to be considered as being in the ordinary course of trade.

The Authority has, therefore, assessed normal values under subsection 269TAC (1)."

Having concluded that Clark had suffered material injury, the Authority next turned in the Report to consider whether the necessary causal link existed between that material injury and the dumping. In concluding that the Authority was satisfied that dumped imports of forklift trucks from the United Kingdom had caused material injury to the local industry, the Authority cumulated exports from the United Kingdom with exports from Japan. Attachment 1 to the Report was a list of legal instruments recommended for the Minister's signature. Included in that list were declarations

pursuant to ss. 269TG(1) and (2). It does not appear that the form of such declarations was attached.

The Authority's recommendations were accepted by the Minister who, on 4 June 1992, caused to be published in the Gazette notices pursuant to ss.269TG(1) and (2). That published under s.269TG(2) provided, inter alia, that the Minister was satisfied as to certain forklift trucks, therein referred to as the *"goods"* 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:"*

The solicitors for Hyster sought from the Minister a Statement under s.13 of the Administrative Decisions Judicial Review) Act 1977 in relation to the decision of the Minister on 4 June 1992 to impose dumping duty on the relevant United Kingdom exported forklift trucks. In that Statement the Minister indicated that the Report of the Authority set out the findings of fact made and that it provided the reasoning which the Minister regarded as relevant.

The applicants' submissions

The applicants submitted that the Authority's recommendations to the Minister, and thereby the Minister's reliance on the Authority, were both flawed because:

* The ACS was under an obligation to determine whether the prices and profit margins in the United Kingdom were appropriate or suitable for the determination of normal values. But even if there was no such obligation, on the material available to the ACS the sales in the United Kingdom were not *"suitable"* for the determination of normal values.

* That the Authority was not entitled to cumulate exports from Japan with exports from the United Kingdom, either as a matter of law, or as a matter of fact, in the circumstances of the present case to determine whether dumping of forklift trucks from the United Kingdom caused material injury to Clark.

* That the Minister had a general discretion whether to impose anti-dumping duty and that exercising such a discretion would include a consideration of matters such as whether the imposition of a duty would be of any benefit or detriment to the community and that this discretion was ignored or not taken into account by the Minister.

* That it was a necessary condition precedent to the exercise of the power of the Minister to publish the notice under s.269TG(2) that the report of the Authority which preceded it contain a recommendation of the matters on which the Minister was required to be satisfied, and in particular whether the goods under review may be exported to Australia in the future and/or whether if so that export was likely to be at export prices less than their normal values. The Report failed to contain a recommendation as to those matters.

* That Hyster was denied natural justice because, although given the opportunity to put submissions to the ACS and the Authority, those submissions were not incorporated into any report to the Minister, whose decision was thus made without affording to Hyster itself the opportunity to make its case.

The submissions as to *normal value*

The significance of the concept of *"normal value"* in the determination of whether or not anti-dumping duty should be imposed and the quantum of that duty, is dealt with in Powerlift Nissan and Enichem Anic Srl v The Anti-Dumping Authority (Full Court, unreported, 30 November 1992) and need not be repeated. *"Normal Value"* is defined in s.269TAC, which, so far as is relevant to the present decision, provides 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 amount 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."

The applicants' first submission was that the ACS was under an obligation, having been given information which showed a substantial difference between prices and profit margins applicable to forklift trucks sold in the United Kingdom and those sold elsewhere, for example, in Japan, to conduct itself further investigations to determine whether those prices or profit margins were appropriate for a determination of *"normal value"*. There are two related submissions here involved. The first is that there is some duty imposed here to investigate the relevant facts, once an indication of a substantial difference between prices in the United Kingdom and those elsewhere is raised. The second is that, in any event, accepting that the discrepancy of prices arose from the existence of an oligopoly in the United Kingdom, that fact made the United Kingdom arm's length prices unsuitable for use in determining normal value.

The first proposition is, in my view, not tenable on the present facts. In the normal case at least, a decision-maker does not have an obligation, merely because an assertion of fact is made and even if that assertion is known to be correct, to make investigations of fact. An extreme example of that can be seen from Enichem. As that case demonstrated, the mere assertion that there was a problem in the market, in that case what had been described as a *"natural monopoly"*, did not mean that the decision-maker was bound to investigate the matter further. As I there said (at 24):

> *"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."*

However, a case may arise where the information tendered to the decision-maker is more than a *"mere assertion"*. It is the submission of the applicants that the present is such a case and indeed it must be conceded that the information as to prices and profit margins supplied by the applicants was detailed and convincing.

The submission was, that in such a case, there was an obligation to investigate further. Reference was made to the decision of Wilcox J in CA Ford Pty Ltd v The Comptroller-General of Customs (1992) 25 ALD 275. That case was concerned with the question whether a preliminary finding of the Comptroller-General as to dumping should be set aside. A submission had been made containing a clear statement that there was a Taiwanese domestic market for castors. No attempt was made by customs officers to investigate whether such a market existed and if so, the prices operative in it. His Honour reaffirmed what he had said in Prasad v The Minister for Immigration & Ethnic Affairs (1985) 6 FCR 155 at 169-70, that the failure to ascertain relevant facts which the decision-maker knew to be readily available to him might

render the decision unreasonable in the Wednesbury sense. His Honour had recognised that the cases in which a decision would be invalid because of a failure to make inquiries would be quite limited. His Honour said (at 288):

> *"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. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it. It would follow that the court, on judicial review, should receive evidence as to the existence and nature of that information."*

In Ford, his Honour was able to reach a conclusion without passing upon the question whether the failure to make further inquiries brought about the result that the decision was so unreasonable that no reasonable decision-maker could have reached it. In the present case, there is no suggestion that inquiries would have led to any conclusion other than that the figures supplied by the applicants were correct and that the cause of the high prices and profit margins in the United Kingdom lay in the existence there of an oligopoly. In these circumstances, it is unnecessary for me to consider whether the approach suggested by Wilcox J in Ford is correct. It suffices to say that if there be a case where to fail to

conduct inquiries would bring about the result that a decision was unreasonable in the Wednesbury sense, the present is not such a case.

The more significant question is whether the existence of an oligopoly in the United Kingdom having the consequence of increasing prices and profit margins must, as a matter of law, have the consequence that the prima facie test in s.269TAC(1) must be abandoned in favour of the test set out in s.269TAC(2). The applicants were bound to put their submission in that way because, unless the decision-maker was bound to apply s.269TAC(2), in the circumstances no ground for judicial review could be made out.

In Enichem, in a judgment in which Gummow and O'Connor JJ concurred, I discussed the scheme of s.269TAC. As I there said, the *prima facie* position will be the ascertainment of *normal value* through s.269TAC(1). However, s.269TAC recognises that there will be cases where s.269TAC(1) will not give a true *normal value* of goods. I set out a number of examples of cases where this could be the case. The two most obvious are cases where there are no sales at all in the country of origin, or no arm's length sales. The question of the *suitability* of sales for the purpose of ss.269TAC(2)(a) and (c) could arise where there was some factor which so distorted the market that arm's length transactions made in the ordinary course of trade were rendered unsuitable to give

the true *normal value* in the country of export. Incidentally, it may be said that *"suitability"* in s.269TAC(2)(a)(ii) must mean something different from lack of arm's length sales, that being a matter within s.269TAC(2)(a)(i). To the extent that the Authority took a different view, it erred in law. I will return to this later.

In Enichem, I did not attempt an exhaustive discussion of the circumstances where arm's length sales might be found to be *"unsuitable"*. Such a discussion would certainly not be appropriate, even if otherwise possible. I gave as an example (at 21), the case where there was:

> *"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."*

By way of illustration, I instanced the circumstance where the existence of government monopoly of the trade or the existence of government control of the domestic price made use of arm's length prices unreliable. It was conceded in Enichem 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 s.269(1). Hence I did not discuss that question in any detail. Having regard to the concession, I commented (at 23):

> *"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."*

No such concession is made in the present case by the respondents. Rather, the Authority and the Minister submitted that, to the extent that Enichem suggested that a price which was *"artificially high"* by reason of the existence of a monopoly would be unsuitable for use for the purposes of s.269TAC(1), that suggestion was incorrect. It was said that the idea of a notional free market price finds no place in the legislation dealing with anti-dumping, either expressly or by implication. Further, it was submitted that the Act did not require a decision-maker to demonopolise the domestic price in the country of export before comparing that price with the *export price* for the purposes of s.269TG.

To the contrary, it was submitted that market imperfection was an essential prerequisite to dumping. Otherwise, it was suggested, international arbitrage would operate to negate the effect of the price differentiation, as the dumped goods would simply be bought by a competitor at the lower export price and resold at the higher price in the

country of export. The existence of some degree of monopoly or oligopoly power in the country of export or in some third country was necessary, it was submitted, for an exporter to have any incentive to engage in price differentiation between domestic sales and export sales. Where there was such a degree of monopoly or oligopoly power, the exporter would maximise profit by selling at a higher price in the country of export, and at or below the prevailing international or world price in the export market. In a case where there was no such monopoly or oligopoly power, the exporter would maximise profit by selling at the prevailing international or world price both in the country of export and in the export market.

In support of this submission I was invited to consider the writings of economists detailing, so it was said, the *"classical view"* of the scope and purposes of anti-dumping measures in international law. The material referred to was:

Deardorff. *"Economic Perspectives on Antidumping Law"* in Jackson and Vermulst, Antidumping Law and Practice (1990) Chapter 2.

Bierwagen, *GATT Article VI and the Protectionist Bias in Anti-Dumping Laws* (1990) Chapter II in Studies in Transnational Economic Law Vol 7, Kluwer Law & Taxation Publishers, Boston, USA.

Beseler and Williams, Anti-Dumping and Anti-Subsidy Law: The European Communities (1986) at 41-42, Sweet & Maxwell, London, UK.

Wares, The Theory of Dumping and American Commercial Policy (1977) Chapter 1, Lexington Books, Lexington, USA.

Viner, Dumping: A Problem in International Trade (1966) esp at 347-348 (League of Nations Memorandum on Dumping).

These articles discuss the theory of protection against dumping in the context that price discrimination will be likely to occur when there is a monopolistic situation in the country of export. It is not suggested that what is said in these articles led to the Anti-Dumping Code in the GATT Treaty, or that these articles in some way set out the mischief which was taken into account by the legislature when enacting anti-dumping legislation in Australia. For this reason there is a very real difficulty in the use to which these materials may be put.

If it were relevant in the present case to determine what the economic theories were underlying dumping and to attempt a critical analysis of those theories, then no doubt expert evidence would need be led from economists in the proceedings, so that differing views, if such exist, could be explored and a decision reached on the basis of that evidence. It may well be that such evidence would suggest that the theoretical model of a perfect market does not exist, so that contrary to the views of some economists, if competition existed in the country of export and if goods were imported into another country at a price lower than that prevailing in the country of export, others in the country of export would buy at the lower price and sell in the country of export. In this event, the price in the country of export and, if perfect competition existed, in the country of import, might be expected to lead to an increase in the price in that place.

The Australian legislation treats the cause of dumping as a matter of little significance. Essentially, the legislation will operate in all cases where the goods in question are priced in Australia at a figure lower than they are priced in the country of export. The fact that on the one hand the price in the place of export is inflated because of the existence of a monopoly (or an oligopoly), or on the other hand, that the price in the country of import (Australia) is artificially low, because of a desire on the part of the exporter to force others out of the Australian market, will be irrelevant. The question which is relevant, for the purposes of s.269TAC(2)(a)(ii), is whether, having regard to the situation in the relevant market, there is something about the sale prices obtained in that market which renders them *"unsuitable"* for use for the purpose of determining *"normal value"*. I can do no more than repeat what I said in Enichem (at 21) in the passage cited earlier in this judgment.

I do not think that it is desirable, in the present case, to attempt to set limits on what in particular circumstances will constitute suitable and what will constitute unsuitable prices. Suffice it to be said here that the mere fact that an oligopoly exists in the country of export, which has led to higher prices and higher profit margins, does not of itself make the prices prevailing in that country unsuitable for use in determining the normal value.

The conclusion of the Authority that imperfect market conditions are of themselves insufficient grounds to ignore domestic prices is, in my view, correct. As I have already indicated, to the extent that the Authority suggested that the criterion of suitability in s.269TAC(2)(a)(ii) is to be equated with *"in the ordinary course of trade"*, the Authority was wrong in law. Sales other than in the ordinary course of trade fall within s.269TAC(2)(a)(i). However, in the present case, the error, if there was one, was immaterial, and could not have affected the outcome. I am of the view, accordingly, that this submission should not be decided in favour of the applicants.

Was cumulation possible?

The applicants' submission that the Authority was not entitled, as a matter of law, to cumulate exports from Japan with exports from the United Kingdom can not be sustained having regard to the decision of the Full Court in Enichem which decided to the contrary. The submission that on the facts of this case no cumulation could properly be made also fails.

The argument was made that because anti-dumping duty had been imposed in respect of Japanese imports before the decision of the Authority was arrived at, it was no longer possible to take Japanese imports into account in determining

whether the necessary causal connection existed between the dumping by the applicants and the material injury to Australian industry. The material injury being considered by the Authority related to the period January 1989 to July 1991, a period which the Authority extended up to the end of March 1992. This period overlapped with the period considered by the ACS in ACS Dumping Report 91/23 in connection with Japan. That is to say, the Authority was considering at the same time dumping by both the United Kingdom exporters and Japanese exporters before measures were taken against the exports from Japan by Notice published in the Commonwealth Gazette on 11 March 1992. In these circumstances the argument is untenable.

The General Discretion of the Minister

The next submission was, in one of its formulations, a reflection of the preceding submission, albeit differently cast. The starting point was that s.269TG(2), like s.269TG(1) confers upon the Minister a discretion even where he is satisfied of the matters set out in ss.269TG(2)(a) and (b), to determine whether to publish a notice in the Gazette declaring that s.8 of the Customs Tariff (Anti-Dumping) Act 1975 applied to goods. The submission then continued that the existence of this discretion conferred upon the Minister an obligation to consider whether there was any utility in imposing dumping duties (as the argument was put in Hyster's written submission) or, as it was put in the course of oral argument,

whether the imposition of duty would be of benefit or detriment to the society. This was, so it was said, a matter in respect of which submissions were sought and received, but it was a matter ultimately not considered by the Authority in its Report or by the Minister who relied upon that Report in arriving at his own reasons.

The existence of the discretion was said to be reinforced by s.10 of the Anti-Dumping Authority Act 1988 which, without limiting the matters to which the Authority might have regard in performing its functions and exercising its power, directs the Authority to have regard to the matters set out in that section. Presumably the reinforcement came about because the Minister would have the Report of the Authority before him in determining whether to publish the s.269TG(2) notice.

I am prepared to accept, for the purposes of the submission, the existence of a discretion on the part of the Minister. However, I believe there is room for an argument that once the Minister had reached the appropriate state of satisfaction referred to, the publication of a notice is mandatory rather than discretionary; or, in other words, that the word *"may"* is not used in the section in such a way as to confer a further discretion upon the Minister. However, it does not follow that if there is a discretion, the Minister exercising that discretion is obliged as a matter of law to

take into account the economic effect on Australian industry caused by the imposition of dumping duties, as counsel for Hyster submitted. This is so notwithstanding that this was a matter addressed in submissions to the Authority made by Ronald C Fisher Trade Consultants Pty Limited on behalf of Hyster in a letter of 21 April 1992.

Reference may be made to the decision of Mason CJ in Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24 at 39 to 42. In that well-known discussion, the Chief Justice pointed out that whether a decision-maker is bound to take into account a particular matter will be determined as a matter of construction of the particular statute conferring a discretion. Where, as here, the statue does not expressly state that the decision-maker is bound to take a particular matter into account, resort must be had to the *"subject-matter, scope and purpose of the Act"*. Subject thereto, as his Honour said (at 40):

> *"In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard... By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of*

> *the statute, the Court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act."*

In my view, there is nothing in the subject-matter, scope and purpose of the present legislation which requires the conclusion that the Minister is bound to take into account the national interest. Indeed, it is of historical interest, although of course not determinative to note that Professor Gruen, who was asked to consider, inter alia, whether the legislation should specifically state a public interest criterion, recommended in his 1986 report Review of the Customs Tariff (Anti-Dumping) Act 1975 (AGPS 1986 Canberra) in the negative. Nor is it, in my view, incumbent upon the Minister to consider whether at the end of the day there will be some *"utility"* in imposing dumping duty, whatever that might mean. Behind the submission was the argument that once the duty had been imposed upon Japanese imported forklift trucks, there was no utility in imposing the duty on forklift trucks imported by Hyster, since, viewed discretely, that importation caused no harm to the Australian industry and that this was a matter which the Minister was bound to take into account. However, detriment to the Australian industry and the question of causation were matters which the Minister was required to be satisfied about before the exercise of discretion. It can not be implied that they were to be reconsidered, this time without cumulation, when determining

whether the discretion was to be exercised. It follows, in my view, that in either formulation (if they be different) the submission must fail.

The absence of a necessary condition precedent

It was submitted that it was a necessary condition, precedent to the exercise by the Minister of the s.269TG(2) power, that there be a Report of the Authority containing a *"recommendation"* of matters in respect of which the Minister is required to be satisfied and, in particular, whether the goods under review may be exported to Australia in the future, and evidence as to the likelihood that goods *"may be exported to Australia in the future"* at export prices less than their normal values. However, it was said the Authority's Report concentrated in its entirety upon goods that had been exported in the past and was silent as to goods which might be exported in the future, and failed to contain the necessary recommendation to the Minister.

It is convenient to deal with the question of the alleged absence of a recommendation first.

It can be seen from the terms of s.269TG(2) that one of the matters in respect of which the Minister must be satisfied before acting under that section relates to the export price of like goods that *"may be exported to Australia*

in the future". By virtue of s.7(1)(d) of the Anti-Dumping Authority Act 1988, the Authority is, inter alia, required to give to the Minister a Report:

> *"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."*

The Authority is required to include in its Report all reasons for the recommendations which it makes. Thus it was submitted that the Authority is required in its Report to make a recommendation on the question whether the Minister ought to be satisfied that 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. It is submitted that no such recommendation was made and further that such recommendation was a condition precedent to the valid exercise of power by the Minister under s.269TG(2) and that the failure operated to void the Minister's action under s.269TG(2).

Counsel for the Minister submitted that the making of the recommendation was not a necessary condition precedent, but, in the alternative, that such a recommendation was in any event made. To determine the latter question it is necessary to refer to the Authority's Report.

A perusal of the Report shows that there is no specific and separate recommendation from the Authority that the Minister be satisfied of the matters referred to in s.269TG(2). In Part 11 *"Conclusions"*, the Authority concluded its Report in the following terms:

> *"The Authority concludes that:*
>
> * *forklift trucks have been exported from the UK by Hyster Europe at dumped prices;*
>
> * *Clark has suffered material injury; and*
>
> * *forklift trucks exported by Hyster Europe from the UK at dumped prices have caused material injury to Clark."*

It may be observed that these conclusions are expressed in terms of past export of trucks by Hyster and not in terms of future exports. However, there were recommendations contained in Part 1 *"Summary and Recommendations"* that the Authority recommend to the Minister that the Minister publish a notice under s.269TG(2) and:

> *"to give effect to these recommendations the Authority recommends that the Minister sign the legal notices listed at Attachment 1 to this report."*

Relevantly, Attachment 1 included:

"instruments under section 269TG of the Customs Act declaring that section 8 of the Customs Tariff (Anti-Dumping) Act 1975 applies to exports of forklift trucks from the UK;".

No form of notice was included in the report.

The Ministers' submission was that, in a case where no live issue arose between the parties, the elliptical reference in the present Report to a recommendation that s.269TG instruments be signed sufficed to comply with s.7 of the Anti-Dumping Authority Act 1988. With respect, I do not see how the fact that the matter was not an issue between the Authority and Hyster can affect whether there has been compliance with s.7 in the making of a recommendation. Either there has been such compliance or there has not.

Although I do not think the matter is free from doubt, I do not think that it can properly be said that the Authority has recommended that the Minister ought to be satisfied of the matters referred to in s.269TG merely because the Authority has recommended the giving of a notice under s.269TG. Indeed, ss.7(1)(c) and (d) of the Anti-Dumping Act appear to differentiate between recommending that a notice should be published, on the one hand, and recommending that the Minister ought to be satisfied on the other. The one recommendation is general, the other specific. In fact, the actual notice given by the Minister, after considering the

Authority's Report, states the Minister's satisfaction. That statement is not a prerequisite to the validity of the notice, yet the existence of the satisfaction clearly is. I think that the result could have been different if the Authority had recommended not merely the giving of a s.269TG notice, but also that the notice be in a form stating the existence of the Minister's satisfaction. However, that is not what was done.

The question then arises whether the failure to make the recommendation, as required by s.7 of the Anti-Dumping Authority Act 1988, has the consequence of invalidating the actual notice. The Minister submitted that it did not, although the submission was not enlarged upon. The scheme of the legislation suggests the contrary. The Authority has a vital role in the legislative scheme. In most, if not all, cases the process of consideration of whether dumping duty should be imposed will commence with the institution of a complaint either by an individual or the government of a third country under s.269TB. Although in Powerlift (Nissan) I held that the power in the Minister to publish a notice declaring that s.8 of the Anti-Dumping Act applies was not subject to the making of a complaint under s.269TB, I did not decide in that case whether once a s.269TB complaint was made the Minister could ignore the balance of the provisions in the Customs Act of investigation and review and independently publish a notice imposing duty. Indeed, it is my view that once the s.269TB complaint has been made, the procedure in the

Customs Act of submissions, investigations and review, involving the Comptroller, interested parties and the Authority, are mandatory.

Thus, if the s.269TB complaint is not rejected by the Comptroller, a notice is to be published by the Comptroller identifying, inter alia, the goods in question and inviting interested parties to make submissions: s.269TC(4). Those submissions are then to be considered by the Comptroller who makes a *"preliminary finding"* under s.269TD. If that finding is that there are sufficient grounds for publication of an anti-dumping notice under s.269TG, the Comptroller is required to refer to the Authority the question whether the publication of the notice sought is so justified: s.269TD(2)(b). Where the finding is that there are insufficient grounds for publication of an anti-dumping notice under s.269TG, the Comptroller is to notify the complainant. They may refer the finding to the Authority for review of that finding. The legislative scheme, at least in a case originating with a complaint under s.269TB, is that there will of necessity be an investigation and report by the Authority before the Minister may publish the s.269TG notice which causes dumping duty to be payable.

There is nothing to suggest that the Minister is in any way bound to accept the Authority's recommendations. Section 269TG itself contains no reference to the Authority or

its Report and, indeed, s.269TL suggests to the contrary. What is, however, important is that when making his decision under s.269TG the Minister have the assistance of a Report containing recommendations and reasons. It is hard to imagine, in a case involving a s.269TB complaint, that the making of a s.269TG notice would be valid if prior to the making of that notice no investigation had been conducted by the Authority. Equally, it is hard to imagine that the legislature, having made the reference to the Authority compulsory and having further made it compulsory for the Authority to hand down a report containing recommendations and giving reasons, could contemplate the Minister making a decision to publish the s.269TG notice without there being a Report of the Authority, or without that Report complying with the legislation.

It follows, in my mind, that the failure of the Authority to make the recommendation required by s.7 of the Anti-Dumping Act, prior to the giving of the s.269TG notices, operated to invalidate the giving of those notices.

If, contrary to my view, the Report did contain a recommendation as required by s.7, then I do not think that it is correct that the Report is deficient in failing to make an express finding whether there is any possibility that like goods might in the future be exported to Australia (that not being a matter in issue between the parties) nor in failing to

make an express finding as to goods that may be exported in the future. Nor can it be inferred from the failure to deal with the matter expressly in the Report, that the Minister himself excluded the matter from his consideration. In fact, the s.269TG notice itself states that the Minister was satisfied of the correct matters, and there seems no reason to doubt the correctness of that statement. No attack was made as to the honesty of the Minister.

The Denial of Natural Justice

The submission made on behalf of Hyster was that although it had been afforded the opportunity of making submissions to the ACS and the Authority itself, the requirements of procedural fairness required that Hyster be given the opportunity to make submissions to the Minister himself, because their original submissions were not made available to the Minister.

The question whether the rules of natural justice apply, and if so the content of those rules, will be a matter of construction of the particular legislation. In the present case, it seems to me that there can be no requirement, after an investigation involving the Comptroller and the Authority, for yet another full investigation to be carried out by the Minister, affording further opportunities to make submissions. As the previous discussion emphasises, the Authority plays a

vital role in the procedure leading to the imposition of dumping duty. That Authority conducts a full investigation, affords interested parties the opportunity to make submissions and concludes its function with the publication of a Report setting out the results of its inquiries and its recommendations.

In a case where the Minister merely accepts the Authority's recommendations, procedural fairness hardly requires a further inquiry being undertaken. There may be the possibility that the Tribunal has recommended that no notice be published but the Minister decides otherwise. That is not the present case and it is not necessary to discuss it in detail. It may well be in such a case, if it could legally arise, a matter I do not decide, that the person affected should then be given a right to be heard.

My views accord with those of Davies J at first instance in Enichem Anic Srl v The Anti-Dumping Authority (9 April 1992 at 17-18) where his Honour said:

> *"The rules of procedural fairness did not require that every particular submission made by a party to the inquiry by the Anti-Dumping Authority should be brought to the Minister's attention. Procedural fairness was provided by the inquiry of the Anti-Dumping Authority and by the report of the Anti-Dumping Authority to the Minister. Procedural fairness is ordinarily complied with when it appears that the Anti-Dumping Authority gave a fair opportunity to interested persons to*

> *put submissions and when the Anti-Dumping Authority reported thereon. The legislative purpose in providing the inquiry is to enable the individual submissions of interested parties to be considered. Ministers of State would not have the time to give to the matter the detailed consideration which the Anti-Dumping Authority is able to do. It follows, therefore, that in the ordinary case, provided the Anti-Dumping Authority gives to interested parties the opportunity to put a case and then issues a report thereon dealing with matters of substance which were raised, procedural fairness is provided. The Minister himself, if he wishes to look at individual submissions, would be entitled to do so but there is no lack of natural justice if he fails to do so. What is procedurally fair must be determined in the light of the whole of the circumstances...".*

Nothing said by the Full Court, when Enichem went on appeal, casts doubt upon what was said by Davies J in the passage cited.

I should say that, on the facts of this case, Hyster in fact made submissions directly to the Minister in letters dated 15 and 29 May 1992, putting to him matters in respect to which it had earlier made submissions to the Authority. In these circumstances, it can not be said that there was any failure by the Minister to give Hyster a right to be heard, even if such a right existed.

Conclusion

As I have concluded that the failure of the Authority to make a recommendation in accordance with s.7 of the Anti-Dumping Act had the consequence that the publication by the Minister of the Notice under s.269TG was void, it follows that I would grant to the applicants a declaration to that effect, but otherwise dismiss the application. I would direct the applicants to bring in short minutes of order to give effect to this judgment on a date to be fixed with counsel when I will hear argument as to costs and, if necessary, the form of the order.

I certify that this and the preceding thirty-four (34) pages are a true copy of the Reasons for Judgment herein of his Honour Mr Justice Hill.

Associate:

Date: 17 February 1992

Counsel and Solicitors for First & Second Applicants:	Dr G A Flick instructed by Allen, Allen & Hemsley
Counsel and Solicitors for First Respondent:	S Gageler and A Robertson instructed by Australian Government Solicitor
Counsel and Solicitors for Respondents:	B W Walker instructed by C G Gillis & Co
Dates of Hearing:	18 December 1993
Date Judgment Delivered:	17 February 1993