JUDGMENT No. 108/91

C A T C H W O R D S

CUSTOMS - Anti-dumping - Importation into Australia of castors manufactured in Taiwan - Determination of "normal value" upon the basis of information regarding cost of production - Alleged failure of respondents adequately to investigate the Taiwanese domestic market in order to reach satisfaction as to one of the matters set out in s.269TAC (2) of the Customs Act - Unreasonableness - Failure to take into account a relevant consideration.

Customs Act 1901, ss.269TAC, 269TB, 269TC, 269TD, 269TF.
Customs Tariff (Anti-Dumping) Act 1975, s.8.
Anti-Dumping Authority Act 1988, s.8.

C A Ford Pty Ltd t/as Caford Castors v The Comptroller-General of Customs and The Anti-Dumping Authority

NO. G412 of 1990

WILCOX J

SYDNEY

8 MARCH 1991.

IN THE FEDERAL COURT OF AUSTRALIA)
) No. G412 of 1990
NEW SOUTH WALES DISTRICT REGISTRY)
)
GENERAL DIVISION)

BETWEEN: C A FORD PTY LTD trading as CAFORD CASTORS

Applicant

THE COMPTROLLER-GENERAL OF CUSTOMS

First Respondent

AND: THE ANTI-DUMPING AUTHORITY

Second Respondent

CORAM: WILCOX J
PLACE: SYDNEY
DATE: 8 MARCH 1991

MINUTES OF ORDERS

THE COURT ORDERS THAT:

1. The preliminary finding of the first respondent, the Comptroller-General of Customs, number 1990/02 entitled "Castors Exported from Taiwan Province" and dated March 1990 be set aside.

2. The decision of the second respondent, the Anti-Dumping Authority, to affirm the said preliminary finding, made in report number 19 of May 1990, be set aside.

3. The application of the applicant, C A Ford Pty Ltd trading as Caford Castors, made on 18 September 1989 and relating to the importation of castors into Australia from Taiwan be remitted to the first respondent for further consideration according to law.

4. The respondents pay to the applicant its costs of this proceeding.

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

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REASONS FOR JUDGMENT

WILCOX J: This is a proceeding, brought under the Administrative Decisions (Judicial Review) Act 1977, whereby the applicant, C A Ford Pty Ltd, challenges decisions made by the respondents, the Comptroller-General of Customs and the Anti-Dumping Authority, in connection with a dumping complaint.

Prior to the date of trial some affidavits were filed but, in the event, neither party sought to read any affidavits or to adduce oral evidence. Counsel on both sides

of the record were content to tender certain documentary material, inviting me to take from it the facts of the case. As no conflict of fact emerges from that material, there is no difficulty about my taking that course.

The applicant carries on business at Box Hill, Victoria under the business name "Caford Castors". In the course of that business it manufactures and distributes a range of plastic twin wheel and metal ball castors which are suitable for fitting to furniture. The applicant apparently formed the view that the Australian castor market was being affected by castors imported from Taiwan at dumped prices. On 18 September 1989 it lodged with the Australian Customs Service ("ACS") an application under s.269TB of the Customs Act 1901 for the publication by the Minister of a dumping duty notice under s.8 of the Customs Tariff (Anti-Dumping) Act 1975. As it then stood, s.8 relevantly provided:

> "8(1) Subject to section 13, where the Minister is satisfied, as to any goods that have been exported to Australia, that -
>
> (a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and
>
> (b) by reason thereof -
>
> (i) material injury to an Australian industry producing like goods has been or is being caused or is threatened or the establishment of an Australian industry

producing like goods has been or may be materially hindered; or

(ii) in a case where security has been taken under section 42 of the Customs Act in respect of any duty that may become payable on the goods under this section - 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 this section applies to those goods.

(2) Where the Minister is satisfied, as to goods of any kind, that -

(a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and

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

the Minister may, by notice published in the Gazette (whether or not he has made, or proposes to make, a declaration under sub-section (1) in respect of like goods that have been exported to Australia), declare that this section applies to like goods -

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

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

(2AA) Where:

(a) a notice under subsection (1) declares particular goods to be goods to which this section applies; or

(b) a notice under subsection (2) declares like goods in relation to goods of a particular kind to be goods to which this section applies;

the notice shall include a statement of the amount that the Minister has ascertained is or would be the normal value of the goods to which the declaration relates at the time of publication of the notice unless, in the opinion of the Minister, the inclusion of that statement would adversely affect the business or commercial interests of any person.

(2A) ...

(3) There shall be charged, collected and paid on goods to which this section applies a special duty of Customs, to be known as dumping duty.

(4) Subject to sub-section (5), the dumping duty in respect of goods is a sum equal to the amount by which the amount of the export price of the goods is less than the amount of the normal value of the goods.

(5) ...

(5A) ...

(5B) ...

(6) ...

(7) ...

(8) ..."

Section 269TB of the Customs Act provides for an application by any person (subs.(1)) or by the Government of a third country (subs.(2)) for the publication of a dumping duty notice. Subsection (2) has no relevance to the present case. Relevantly, section 269TB reads:

> "269TB.(1) Where:
>
> (a) a consignment of goods:
>
> (i) has been imported into Australia;
>
> (ii) is likely to be imported into Australia; or
>
> (iii) may be imported into Australia, being like goods to goods to which subparagraph (i) or (ii) applies;
>
> (b) there is, or may be established, an Australian industry producing like goods; and
>
> (c) a person believes that there are, or may be, reasonable grounds for the publication of a dumping duty notice or a countervailing duty notice in respect of the goods in the consignment;
>
> that person may, by application in writing lodged with the Comptroller, request that the Minister publish that notice in respect of the goods in the consignment.
>
> (2) ...
>
> (3) An application under subsection (1) or (2) shall:
>
> (a) be in accordance with an approved form;
>
> (b) include such information relating to:

(i) the matters referred to in paragraphs (a) and (b) of that subsection; and

(ii) the matters which the applicant believes constitute reasonable grounds for the publication of a dumping duty notice or a countervailing duty notice to which the application relates;

as is required by the form; and

(c) be signed and witnessed in the manner indicated in the form."

The word "Comptroller", in this section, refers to the Comptroller-General of Customs, the first respondent: see s.4 of the Act.

It is common ground that the application made by the applicant complied with subs.(3). The "approved form", which the applicant completed, was in the form of a questionnaire. It dealt with a variety of matters including the "normal value" of the subject goods. At that time the concept of "normal value" was explained by s.5 of the Customs Tariff (Anti-Dumping) Act. However, that section was repealed by Act no. 172 of 1989, which took effect on 21 December 1989. Thereafter normal value was governed by s.269TAC of the Customs Act which relevantly reads:

"269TAC.(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); or

(b) is satisfied, in a case where like goods are not 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, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under subsection (1);

the normal value of the goods for the purposes 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.

(3) ...

(4) ...

(5) ...

(6) Where the Minister is satisfied that sufficient information has not been furnished or is not available to enable the normal value of goods to be ascertained under the preceding subsections, the normal value of those goods is such amount as is determined by

the Minister having regard to all relevant information.

(7) For the purposes of subsection (6), the Minister may disregard any information that he or she considers to be unreliable.

(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.

(9) Where the normal value of goods exported to Australia is to be ascertained in accordance with paragraph (2)(c) or (4)(e), the Minister must make such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods.

(10) ...

(11) ...

(12) ...

(13) ..."

In connection with normal value, the questionnaire asked:

"What is the price charged for like goods by the exporter or other sellers on the domestic market together with evidence (eg. price lists, invoices)?"

The applicant replied:

"Confidential Attachment NINE (page 145) supports the position that no domestic sales are made in the ordinary course of trade and that rubber ball castors are used in the domestic Taiwanese market in preference to twin wheel castors.

Despite this, the ACS in announcing its decision in April, 1987 in response to the industry's earlier dumping complaint, concluded in its Preliminary Finding that there are some domestic selling prices.

Consequently, the Normal Value has been assessed in accordance with Sub-section 5(1) of the Act and determined as follows:

Normal Value: NT$8.84 each for 50mm Unhooded twin-wheel castor = A$0.45 each

E/R NT $19.68 = $A

Refer Attachment NINE.

The TWN50 has been used for normal value purposes as it is the most representative model against which other sizes can be assessed. The above selling price is representative of the price at which Taiwanese furniture factories would be purchasing their requirements. Smaller volume purchasers would pay a higher price (refer page 146).

We believe castors may not be sold in the ordinary course of trade. The Normal Value may, therefore, have to be determined in accordance with sub-section 5(2)(c) of the Act. [Section 5(2)(c) of the Customs Tariff (Anti-Dumping) Act was in the same terms as the present s.269TAC(2)(c) of the Customs Act].

The normal value should, therefore, be determined by reference to the cost of production etc."

The answer went on to set out a calculation for determination of normal value by reference to the cost of production etc.

Confidential Attachment nine was a telex concerning the Taiwanese domestic castor market. But notwithstanding its doubts about that market, the applicant attached to its application a list of the names and addresses of 15 companies which it identified as "Taiwanese suppliers". All 15 addresses were in Taiwan, most of them in the capital, Taipei. Five of these companies were marked with an asterisk as being "believed to be the major overseas producers". In addition, the applicant attached an order form and invoice purporting to record the supply by an additional company to a Taiwanese purchaser of 50 castors. Although both parties to this transaction were located in Taiwan, the order form and invoice were both in English.

Section 269TC of the Customs Act sets out the duty of the Comptroller-General upon receipt of an application under s.269TB. Relevantly it reads:

> "269TC.(1) The Comptroller shall, before the expiration of a period of 55 days, or, if another period is prescribed by the regulations for the purpose, before the expiration of that other period, after lodgment of an application by a person under subsection 269TB(1) in respect of the goods the subject of the application,

examine the application and, if the Comptroller is not satisfied:

(a) that the application complies with subsection 269TB(3); or

(b) that there is, or is likely to be established, an Australian industry in respect of like goods; or

(c) that the matters that are set out in the application as constituting reasonable grounds for the publication of the dumping duty notice or the countervailing duty notice in respect of the goods the subject of the application would, if established, constitute reasonable grounds for the publication of such a notice, or for the publication of such a notice upon the importation into Australia of such goods;

he or she shall reject the application and inform the applicant, by notice in writing, accordingly.

(2) ...

(3) ...

(4) Where the Comptroller does not reject an application in respect of the goods the subject of the application made under subsection 269TB(1) or (2), the Comptroller shall publish a notice in the Gazette and in a newspaper circulating in each State and in the internal Territories:

(a) setting out particulars of those goods;

(b) setting out the identity of the applicant and:

(i) in the case of an application under subsection 269TB(1), the

identity of the producer or producers; and

(ii) in the case of an application under subsection 269TB(2), the identity of the producer or manufacturer who exports like goods to Australia;

(c) stating that, within a specified period after the publication of the notice, being the period of 120 days or, if another period is prescribed by regulations for the purposes of this paragraph, that other period, the Comptroller will make a preliminary finding as to whether there are sufficient grounds for the publication of a dumping duty notice or a countervailing duty notice in respect of the goods the subject of the application or there will be sufficient grounds for such publication subsequent to the importation into Australia of such goods;

(d) stating that a preliminary finding that there are or will be such grounds may result in the imposition of provisional measures including the taking of securities under section 42 of this Act for the period specified in subsection 45(2) of this Act in respect of dumping duty or countervailing duty that may become payable on the importation of the goods the subject of the application; and

(e) inviting interested parties to lodge, within a specified period after publication of the notice, being a period of 40 days or, if a lesser period is indicated in the notice, that lesser period, submissions with the Comptroller, concerning the publication of the notices sought by the application;

and shall give a copy of that notice to the applicant."

The Comptroller-General did not reject the application under s.269TC(1). Although the documents are not in evidence, ACS apparently published the notices required by s.269TC(4) and commenced an investigation of the matter. The sufficiency of that investigation is the central issue in the present dispute.

Section 269TD of the Customs Act requires the Comptroller-General, before the expiration of the period referred to in s.269TC(4), to consider the application, taking into account any submissions received and any other matters that he or she considers relevant. If, as a result of that consideration, the Comptroller-General makes a preliminary finding that there are, or will be upon the importation of the goods, sufficient grounds for the publication of a dumping duty notice, he or she must publish a notification to that effect and may thereafter require and take securities under s.42 of the Act in respect of any duty that may become payable. If the Comptroller-General makes a preliminary finding that there are not sufficient grounds for the publication of a dumping duty notice, he or she must publish a notification to that effect and so inform the person applying for the publication of a dumping duty notice. The applicant may then refer the matter to the Anti-Dumping Authority, an entity established by the Anti-Dumping Authority Act 1988. The Authority is obliged to review the Comptroller-General's decision and may substitute its own preliminary finding: see s.269TF of the Customs Act and s.8 of the Anti-Dumping

Authority Act.

In the present case, the Comptroller-General made a preliminary finding that there were not sufficient grounds for the publication of a dumping duty notice. The preliminary finding was dated March 1990. The finding included an ACS report containing reasons, the gist of which is conveyed by the following extract from the summary:

> "1.5 In investigating an application for anti-dumping action, Customs must ascertain:
>
> (a) whether the goods under inquiry are dumped - that is, whether the export price of the goods is less than their normal value; and, if so
>
> (b) whether the Australian industry producing like goods is suffering material injury or threat of material injury, and whether there is a causal link between the dumping and the injury or threat of injury.
>
> 1.6 Based on the available evidence, it is concluded that:
>
> (a) castors have been exported to Australia from Taiwan Province at dumped prices;
>
> (b) there has been material injury to the Australian industry; but
>
> (c) a causal link between the dumped exports from Taiwan Province and the injury to the Australian industry has not been established.
>
> 1.7 It is recommended that a preliminary finding be made that:
>
> (a) there is not a causal link between the exports at dumped

> prices and injury to the Australian industry and there are not sufficient grounds for the imposition of anti-dumping measures; and
>
> (b) the investigation into the export of castors from Taiwan Province at dumped prices be terminated."

The report's conclusion that the subject castors had been dumped in Australia, that there had been material injury to the Australian industry but that the causal link between the dumping and the injury had not been established is startling. ACS's rationale was expressed in para 15.5:

> "15.5 The examination showed that substantial price undercutting would still be apparent if exports from Taiwan were made at non-dumped prices ... The extent of the price undercutting at non-dumped prices was such that the uplift required to increase the non-dumped landed duty paid costs to equate with the applicant's cost to make and sell was well in excess of any dumping margins found. As such the imposition of any anti-dumping measures would not materially alter the injury being caused to the Australian industry by exports from Taiwan."

This reasoning overlooks the fact that injury is a matter of degree. The fact that an Australian industry suffers some loss, and therefore some injury to its business, in competing with non-dumped imports does not mean that it fails to suffer a material injury if, by reason of dumping, the loss is increased. In such a case the effect of the dumping is to increase the extent of the injury. If the

additional loss is material, that loss is a material injury occasioned by the dumping. However, nothing now turns on the validity of the reasoning in para. 15.5. As will appear, in reviewing the ACS decision, the Anti-Dumping Authority did not adopt this reasoning.

The more pertinent aspect of the ACS report is its comments regarding normal value. These are contained in section 12 of the report. It is sufficient to set out paras. 12.8 to 12.13:

> "12.8 Customs conducted on-site inquiries in Taiwan with an exporter of the goods to Australia, Taiwan Specco, and another seller of like goods in Taiwan, Golden Ball.
>
> 12.9 Taiwan Specco is one of the largest exporters to Australia of the goods under inquiry. The firm was found to make no domestic sales in Taiwan of the goods under inquiry, but provided evidence of export selling prices and exporting costs to third countries. Customs was unable to confirm that export sales to third countries were made at prices in the price list provided, and were unable to determine if these sales were arms length transactions in accordance with s.269TAC(2)(d) of the Customs Act.
>
> 12.10 In accordance with the provisions of s.269TAC (1) of the Customs Act, on-site inquiries were undertaken with another seller of like goods in Taiwan - Golden Ball. Golden Ball provided details of domestic selling prices for certain of the goods under inquiry. In addition, Golden Ball provided evidence of the cost of raw materials, manufacturing costs, inland freight costs, factory overheads and other costs, and terms

of credit associated with domestic sales.

12.11 The firm was found to have made relevant domestic sales of only two models of the castors covered by the application (42mm nylon hooded twin wheel and 50mm nylon hooded twin wheel). An examination of the sales of the 50mm model by Golden Ball revealed that sales were not made in the ordinary course of trade, and therefore were considered not suitable to assess normal values under s.269TAC(1) of the Customs Act. Alternatively, s.269TAC(2)(c) of the Customs Act provides that the normal value of any goods is the sum of the cost of production, delivery charges and other costs incurred in the sale, and, subject to subsection 13 of the Customs Act, an amount for profit.

12.12 The normal value for the 42mm model has been ascertained under s.269TAC(1) of the Customs Act on the basis of domestic sale prices in Taiwan. Customs was able to verify the evidence provided by Golden Ball in relation to the cost of production and selling expenses of all models of castors under inquiry. Normal values for all the goods under inquiry except 42mm nylon hooded twin wheel castors have been determined by reference to the cost of production and selling expenses as provided for in s.269TAC(2)(c) of the Customs Act.

12.13 Golden Ball made claims for due allowances provided for in s.269TAC(8) & (9) of the Customs Act and a submission was made by Coopers and Lybrand on behalf of the Australian Castor Importers Association. The submission requested that normal values should be adjusted for due allowance to take account of certain differences between domestic sales in Taiwan and export sales to Australia."

The essence of the claim made by the applicant is

that these paragraphs show that the investigation by ACS, in order to determine normal value, was quite inadequate. But, to put that claim into context, I should finish the story.

As already indicated, the applicant requested review by the Anti-Dumping Authority of the Comptroller-General's decision. The Authority undertook that review and, on 31 May 1990, it published its report. The Authority confirmed the Comptroller-General's negative preliminary finding, but for a different reason. The Authority was unable to find that the Australian industry had suffered material injury from the dumped imports. In reaching this conclusion it looked at changes in market volumes and shares, and in the applicant's selling prices and costs, in respect of eight models of castors. Disagreeing with ACS, the Authority found, in overall terms, that there had been price suppression; that is, an inability by the applicant to increase its prices sufficiently to cover its increased costs. But, agreeing with ACS in rejecting the applicant's submission, the Authority found no evidence of price depression; that is, an actual reduction of prices in response to competition. However, although the Authority found overall price suppression, it was not satisfied that there was price suppression in respect of the two particular models which it found to have been dumped.

The Authority's conclusions on material injury were, of course, critical to its final decision. But they are not at the heart of this case. However, there is a link. At the

commencement of its discussion of material injury the Authority said:

> "At the outset, given that the Authority is satisfied that only two models of castors are being dumped on the Australian market - and that these are at dumping margins of less than five percent - it would seem difficult to conclude that dumping was causing material injury to the Australian industry. Castors of these two kinds would need to have been imported in very large quantities to have caused anything other than a minor irritation to local producers."

It is not obvious to me how this comment may be reconciled with the Authority's finding of overall price suppression and, in particular, that over the three years from 1986-1987 to 1988-1989 the applicant's selling price increased by about 40% whereas its average costs increased by about 80%. But the presently relevant point is that, in reaching its finding on material injury, the Authority was influenced by its identification of the particular models which had been dumped. Given the finding of overall price suppression, it is possible that the Authority would have found material injury in relation to one or more of the other six models, if it had first found dumping. And the question whether dumping had occurred depended upon the normal value of the goods. Accordingly, if the computation of normal value upon which the Authority relied was faulty, it may well have misled the Authority in relation to material injury.

The applicant says that the computation of normal

value was faulty. In accordance with s.8(3) of the Anti-Dumping Authority Act, in determining normal value the Authority had regard only to the material collected by ACS. In its report the Authority summarised that information:

> "To allow assessment of normal value under subsection 269TAC(1), the applicant submitted an invoice relating to a sale in Taiwan of 60 unhooded, twin wheel, 50mm castors - 'the most representative model against which other sizes can be assessed.' The applicant also provided information that could enable normal values to be assessed under subsection 269TAC(2) for the same unhooded, 60mm castor and for an unhooded, 40mm castor. This information included details of nylon and pintle prices and estimates of labour and overhead costs. The applicant suggested that due allowances be made for differences in credit terms, inland transport, raw materials, special packing, domestic taxation and certain sales expenses.
>
> Customs, in its inquiries, sent questionnaires to more than twenty companies in Taiwan. Only one manufacturer - Golden Ball - and one exporter - Taiwan Specco - provided submissions and agreed to an on-site inspection.
>
> Castor production accounts for 80 per cent of Golden Ball's activities. The company manufactures principally for the export market, with about 10 per cent of its castor sales being to Australia - about the same amount as it sells in Taiwan.
>
> Taiwan Specco is an export agent for about 20 Taiwanese manufacturers of various products, including Golden Ball. It is one of the largest exporters of the goods under review to Australia but does not sell them on the Taiwanese market.
>
> Customs conducted on-site inquiries at both Taiwan Specco and Golden Ball to obtain information regarding normal values. Customs found that, of the goods under review, only two - the 42mm hooded and the 50mm hooded - were sold on the domestic market; the others were manufactured by Golden Ball solely for the export market.

> The normal value for the 42mm castor was assessed by Customs under subsection 269TAC(1). Having examined the relevant documentation, including that resulting from the overseas inquiry conducted by Customs, the Authority is satisfied with this assessment.
>
> Customs considered that the 50mm hooded castor was not sold in the ordinary course of trade, since it had been sold at a loss for an extended period of time. While the Authority agrees that the normal value of this castor should be assessed under subsection 269TAC(2)(c), it nevertheless was unable to verify the value prepared by Customs. Consequently, it has re-calculated it from information obtained from the Customs overseas inquiry reports.
>
> The balance of the goods under reference are not sold on the Taiwanese market. Normal value could not, therefore, be assessed under subsection 269TAC(1). Customs assessed them under subsection 269TAC(2)(c), using costs of production and selling figures provided by Golden Ball. The Authority has examined this information and agrees with Customs' assessments and calculations."

It will be noted that the Authority felt able to determine normal value under s.269TAC(1) only in relation to the 42mm castor. As it happened, this was not one of the two models which it found to have been dumped. ACS was able to establish Taiwanese domestic sales in relation to only one other of the remaining seven models; but, even then, not in the ordinary course of trade. Accordingly, in relation to all seven models, other than 42mm, the Authority had resort to s.269TAC(2)(c); assessing normal value by reference to production costs. But, as is common ground, the Authority was entitled to assess normal value under s.269TAC(2)(c) only in a case where it was first satisfied of one or other of the situations described in paras. (a) and (b) of that subsection.

These situations are three in number: the absence of relevant domestic (Taiwanese) sales; the unsuitability of such sales for determining normal value; and the existence of non-arms length transactions combined with the impracticality of obtaining information in relation to sales by other sellers.

Although counsel for the appellant put the matter in a number of ways, relying upon several grounds listed in s.5 of the Administrative Decision (Judicial Review) Act, the crux of their case is that ACS did not carry out an investigation sufficient to establish the existence of any of these three grounds, so that there was no basis upon which the Authority could reach a state of satisfaction in respect of any of them. Accordingly, say counsel, it was erroneous in point of law for the Authority to have resort to s.269TAC(2)(c). Counsel point out that, although their client had supplied the names and addresses of 15 "Taiwanese suppliers" and had referred to a sale by a 16th company, ACS officers only interviewed representatives of Golden Ball.

The evidence includes a minute written by Mr R Cross, an ACS officer stationed in Tokyo, in which he reports on inquiries made by him and a colleague in Taipei on 8 and 9 January 1990. During the course of that visit the two officers interviewed representatives of Golden Ball and of Taiwan Specco, a castor exporter. The minute reveals that a submission had been received by ACS from Taiwan Specco, presumably because it was involved in supplying castors to

Australia and desired to avoid the imposition of an Australian dumping duty. Taiwan Specco acted as exporting agent for Golden Ball. But the minute makes no reference to any attempt by ACS to contact any of the other companies named by the applicant in its response to the questionnaire. Neither does it refer to any attempt to investigate the transaction evidenced by the order and invoice supplied by the applicant to ACS.

A particular criticism made by counsel for the applicant arises out of the circumstance that, on 22 December 1989, Coopers & Lybrand, chartered accountants, had lodged a submission with ACS on behalf of the Castor Importers Association. The Castor Importers Association comprised four Australia-based companies or firms formed, according to Coopers & Lybrand, "to collectively defend the allegations of dumping made by" the applicant. The submission contained a good deal of information relevant to the issues which ACS had to address in considering the applicant's complaint. It also contained some historical material, including discussion about an enquiry undertaken in 1986 in response to an earlier dumping allegation. In the course of discussing normal value, Coopers & Lybrand said:

> "It was noted that in the 1986 enquiry into the alleged dumping of castors that the ACS established normal values under sub-section 5(1) of the Act. The ACS determined that quantities of castors sold on the domestic market in Taiwan, whilst less in quantity than those sold for export, constituted sufficient

numbers to permit the use of sub-section 5(1).

The current position regarding domestic sales of castors in Taiwan is similar to that existing at the time of the previous enquiry.

The main suppliers of castors to each of the Association members are understood to sell castors in Taiwan to end use manufacturers. Distributors akin to our membership apparently do not exist in Taiwan, and we consider that this situation would normally preclude the use of sub-section 5(1) of the Act.

However, given that the ACS elected to use sub-section 5(1) of the Act on the previous occasion it would seem unlikely that it would wish to alter its approach in this enquiry."

The Coopers & Lybrand submission contained a clear statement that there was a Taiwanese domestic market for castors. It is true that, according to the submission, those sales were made by manufacturers directly to end-users rather than to distributors; but, in my opinion and consistently with the 1986 ACS view, that would not matter. The submission was received over two weeks before the ACS officers visited Taipei. But it appears that no attempt was made by them to confirm Coopers & Lybrand's claim regarding the existence of a domestic market and, if it existed, to investigate the prices operative within it. Although ACS could not compel co-operation by any Taiwanese manufacturer or supplier, it might have been possible to obtain information from some or all of the companies identified by the applicant. Moreover, the Coopers & Lybrand material identified four separate Taiwanese suppliers to members of the Castor Importers Association, one of whom was Golden Ball. Counsel argue that it might reasonably be concluded that each of the other three suppliers

would have had an interest in co-operating with ACS in its inquiry; but apparently no attempt was made - directly, through Coopers & Lybrand or through the Australian importer from that supplier - to elicit information from them.

Counsel's suggestion that Coopers & Lybrand might have been able to assist in relation to the Taiwanese domestic market gains support from the ACS report about the 1986 enquiry. Paragraph 9.6 of that report records that "Coopers & Lybrand submitted details of sales of castors in Taiwan Province for the 12 months to June 1986. These details included customers, quantities and selling prices for 6 models under reference. The prices were supported by a detailed sales list, but no domestic invoices".

In response to the contentions of his opponents, counsel for the respondents says that, "in a case such as the present where there were actually sales and supporting figures available from a Taiwanese manufacturer who sold on the domestic market (Golden Ball) it was appropriate for the ACS to use these figures to construct a price under s.269TAC(2)(c) rather than to simply make a determination ... under s.269TAC(6)." But this submission misses the applicant's point. The applicant does not complain of the Authority's failure to use subs.(6); it agrees that it would be inappropriate to use subs.(6) if subs.(2) is available. The applicant's point is that the Authority was not in a position to satisfy itself of the inapplicability of subs.(1). No

relevant Taiwanese domestic sales figures were obtained. Neither, in my opinion, did ACS take the steps which were reasonably open to it to ascertain whether they might be obtained. In saying that, I appreciate that ACS had to reach a preliminary finding within 120 days of receiving the applicant's complaint. The time limit imposed by the Act may sometimes force ACS to accept a more limited investigation than it would wish. But there is nothing to suggest that, in the present case, there was any problem about time or that, if other Taiwanese manufacturers or suppliers were willing to be interviewed at all, they could not have been visited by the two ACS officers during their January visit. The inference which I draw from the documents is that ACS did not attempt to do more than to follow up the submission lodged by Taiwan Specco.

During the course of submissions, there was some debate about the proper legal basis of the applicant's claim. Counsel for the respondents suggested that, in a case such as this, the only basis upon which an applicant could succeed would be upon the ground of unreasonableness: see s.5(2)(g) of the Administrative Decisions (Judicial Review) Act. In relation to that ground, counsel drew attention to a passage in my judgment in Prasad v Minister for Immigration (1985) 6 FCR 155 at pp.169-170 in which I discussed the possibility that a decision might be regarded as unreasonable, in the sense referred to in s.5(2)(g), where the decision-maker unreasonably failed to ascertain relevant facts which he knew

to be readily available to him. I commented that the circumstances under which a decision will be invalid for failure to enquire are 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. 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."

Counsel for the present respondents accepts the correctness of this passage in Prasad. But he says that this is not a case where it was obvious that material was readily available to ACS or that any additional material that ACS officers might obtain by contacting the other named suppliers would have been of practical utility. Counsel points out that the evidence does not disclose why the ACS officers who visited Taiwan did not contact those suppliers.

In response to these submissions, counsel for the applicant say that they do not suggest that the decisions of the Comptroller-General and the Authority were unreasonable because of the failure of the ACS officers to "door-knock" the other named Taiwanese suppliers. But they say that, especially in the light of the 1986 experience, it was obvious

from the Coopers & Lybrand letter that information would be likely to be available from manufacturers other than Golden Ball. Counsel say that it was unreasonable for the Comptroller-General to proceed to a decision without seeking that information out, and it was unreasonable for the Authority to determine normal value upon the basis of such a limited investigation.

Although I think that there is force in the applicant's submissions about unreasonableness, it is unnecessary for me to reach a final view upon them. I am of the opinion that the applicant is entitled to succeed upon another ground, namely that the making of each of the decisions was an improper exercise of the power conferred by the relevant enactment because of the failure of the decision-maker to take into account a relevant consideration: see s.5(1)(e) and s.5(2)(b) of the Administrative Decisions (Judicial Review) Act.

As I have said, it is common ground - and clearly correct - that s.269TAC(2)(c) may only be used for the determination of normal value in a case where the decision-maker is satisfied of the existence of one or more of the situations postulated in para.(a) or para.(b) of s.269TAC(2). Each of those situations involves a finding by the decision-maker, in negative terms, about a particular aspect of the domestic market in the exporting country. It follows that, before resorting to s.269TAC(2)(c), the decision-maker must

make some investigation of that market. To apply the first case, the decision-maker must make, or learn the result of, an investigation which is sufficiently extensive to establish the absence of appropriate sales. In the second case, the investigation must establish the unsuitability of such sales as are available. In the third situation, the decision-maker must be satisfied of the impracticability of obtaining information in relation to other sellers of like goods.

The form of paras.(a) and (b), whereby the decision-maker is required to be satisfied of a negative proposition, might be taken as an indication of a legislative intention that ACS hold an exhaustive inquiry. But I think that it would be unreasonable to construe those paragraphs in that way. Each of the three postulated situations relates to characteristics of a domestic market for particular goods in a foreign country. ACS has no power to compel persons in that country to supply information to it. Even when information is available, ACS may find difficulty in its analysis because of the form in which it is kept. Moreover, the investigation must be completed within a limited time, usually 120 days. I think that paras.(a) and (b) should be read as referring to a situation where, on the material reasonably available to ACS within the stipulated time, the decision-maker is satisfied of one of the postulated situations. By "reasonably available" I mean available in the course of such an investigation as, in all the circumstances, it is reasonable to expect ACS to make.

In the present case, the material available to ACS included the letter from Coopers & Lybrand. That letter made an assertion of the existence of a Taiwanese market complying with s.269TAC(1); therefore implicitly negating each of the situations mentioned in s.269TAC(2). Evidence as to the existence of such a market had been supplied by Coopers & Lybrand, and acted upon by ACS, only three years earlier. The letter was written on the instructions of four Australian importers who had commercial relationships with four Taiwanese manufacturers. The letter was clearly a consideration which needed to be taken into account in determining whether subs.(2) was satisfied. Of course, if the matters set out in the letter had been investigated, ACS might have found that Coopers & Lybrand's assertion was wrong. ACS was not bound simply to accept that assertion; indeed, it would have been wrong to do so. But the assertion was a matter requiring consideration. However, neither ACS or the Authority seems to have given it any consideration whatever. Neither of the reports even mentions the assertion or the findings made in 1986.

If my analysis of the requirements of s.269TAC(2) is correct, there is a close similarity between the duty of a decision-maker under that sub-section and the situation which I postulated in Prasad. The two cases may overlap. I do not need to decide whether they do so in this case. I am content to decide the matter upon the basis that each of the decision-makers failed to take into account the relevant portion of the

Coopers & Lybrand letter.

The applicant also submitted that the decisions reflected an error of law: see s.5(1)(f) of the Administrative Decisions (Judicial Review) Act. In the view I take it is not necessary to decide this question.

I propose to set aside both the preliminary negative finding of the Comptroller-General and the Authority's decision affirming that finding. I will remit the matter to the Comptroller-General for further consideration, thus enabling him to carry out an investigation which meets the standards to which I have referred and to make a new preliminary finding in the light thereof. Whether the Authority will become further involved in the matter will depend upon the nature of that finding and the applicant's response to it.

The respondents must pay the applicant's costs.

I certify that this and the preceding thirty-one (31) pages are a true copy of the Reasons for Judgment of the Honourable Justice Wilcox.

Associate: Rabil Alkadaman

Dated: 8 March 1991

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Solicitors for the Applicant:	C G Gillis & Co
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Solicitors for the First and Second Respondents:	Australian Government Solicitor
Date(s) of hearing:	8 February 1991