JUDGMENT No. 175 1992

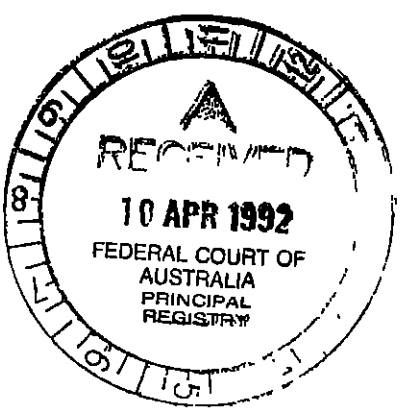
C A T C H W O R D S

CUSTOMS AND EXCISE - report by Anti-Dumping Authority recommending anti-dumping action - whether the normal value of the goods should have been calculated on the basis of domestic or international sales - whether an error of law - whether a breach of the rules of procedural fairness.

Customs Act 1901 (Cth) - ss.269TAC, 269TG(1).

ENICHEM ANIC S.r.1 and ENIMONT AUSTRALIA PTY LIMITED
v. THE ANTI-DUMPING AUTHORITY and THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS
No. G 612 of 1991

Davies J.
9 April 1992
Sydney



IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No G 612 of 1991
)
GENERAL DIVISION)
)

BETWEEN: ENICHEM ANIC S.r.l

First Applicant

ENIMONT AUSTRALIA PTY LIMITED

Second Applicant

THE ANTI-DUMPING AUTHORITY

First Respondent

THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS

Second Respondent

Coram: Davies J.
Date: 9 April 1992
Place: Sydney

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The Applicants pay the Respondents' costs.

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

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THE ANTI-DUMPING AUTHORITY

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Second Respondent

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REASONS FOR JUDGMENT

This application under the Administrative Decisions (Judicial Review) Act 1977 (Cth) seeks orders of review with respect to decisions of the Anti-Dumping Authority and of the Minister for Small Business and Customs which are described as follows:-

> "1. The decision of the First Respondent set out in Report No. 40, June 1991, entitled 'Sodium Cyanide from the Federal Republic of Germany, Italy, Japan, Republic of Korea, United Kingdom and the United States of America', recommending that the Second Respondent take action resulting in the imposition of anti-dumping duty on the export of

sodium cyanide from Italy to Australia by the First Applicant.

2. The decisions of the Second Respondent, on or about 8 July, 1991:

(a) that he was satisfied that the export price of the First Applicant's sodium cyanide was less than the normal value of that sodium cyanide and that this caused or threatened to cause material injury to an Australian industry producing like goods;

(b) that he should impose anti-dumping duties against the First Applicant's exports of sodium cyanide from Italy to Australia; and

(c) to publish notices in the Commonwealth of Australia Gazette of 17 July, 1991, declaring that S.8 of the *Customs Tariff (Anti-Dumping) Act* 1975 (Commonwealth) applies, thereby resulting in the imposition of anti-dumping duty on the First Applicant's exports of sodium cyanide from Italy to Australia.

..."

In June 1991, the Anti-Dumping Authority issued report No. 40 with respect to alleged dumping of sodium cyanide from Germany, Italy, Japan, the Republic of Korea, the United Kingdom and the United States of America. The finding and recommendation of the Authority read as follows:-

"1.2 Recommendation

The Authority recommends that the Minister:

- publish a dumping duty legal instrument under subsection 269TG(2) of the Customs Act 1901 against exports of sodium cyanide from Degussa AG (Germany), Enimont Anic SRL (Italy), Tong Suh Petrochemicals Corp. Ltd. (Korea), Mitsui & Co (Japan), and ICI Chemicals and Polymers (UK);

- not take anti-dumping action against the export of sodium cyanide from E.I. Du Pont De Nemours & Co (Inc), USA;

- publish a legal instrument, under subsection 269TG(1), to call up securities incurred since the imposition of provisional measures; and

- agree that, on the grounds of confidentiality, legal instruments relating to subsection 269TAC(8) of the Customs Act 1901 and to subsection 8(5) of the Customs Tariff (Anti-Dumping) Act 1975 not be published.

To give effect to these recommendations, the Authority recommends that the Minister sign the legal instruments which are listed at Attachment 1 to this report."

On 8 July 1991, the Minister accepted the recommendations of the Anti-Dumping Authority and caused the following notices to be published in the Gazette on 17 July 1991:-

"I, DAVID PETER BEDDALL, Minister of State for Small Business and Customs, pursuant to subsection 269TG(1) of the Customs Act 1901, am satisfied in respect of sodium cyanide, hereinafter referred to as the 'goods', exported from Degussa A.G. of the Federal Republic of Germany, Enimont Anic SRL of Italy, Mitsui & Co Ltd of Japan, Tong Suh Petrochemical Corp Ltd from the Republic of Korea and ICI Chemicals & Polymers Ltd of the United Kingdom:

(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:

material injury to an Australian industry would or might have been caused if the security had not been taken under section 42 of the Customs Act 1901 in respect of any duty that may become payable on those goods,

and therefore, hereby DECLARE that section 8 of the Customs Tariff (Anti-Dumping) Act 1975 applies to those goods."

and "I, DAVID PETER BEDDALL, Minister of State for Small Business and Customs, pursuant to subsection 269TG(2) of the Customs Act 1901, am satisfied in respect of sodium cyanide, hereinafter referred to as the 'goods', exported from Degussa A.G. of the Federal Republic of Germany, Enimont Anic SRL of Italy, Mitsui & Co Ltd of Japan, Tong Suh Petrochemical Corp Ltd from the Republic of Korea and ICI Chemicals & Polymers Ltd of the United Kingdom:

(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and

(b) because of that material injury to an Australian industry producing like goods is being caused

and therefore, hereby DECLARE that section 8 of the Customs Tariff (Anti-Dumping) Act 1975 applies to like goods

(c) that are exported to Australia after the date of publication of this Notice: and

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

Relevant provisions of the Customs Act 1901 (Cth) ("the Act") read:-

"269TG (1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia, that:

(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and

(b) because of that:

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

(ii) in a case where security has been taken under section 42 in respect of any duty that may become payable on the goods under section 8 of the Anti-Dumping Act - material injury to an Australian industry producing like goods would or might have been caused if the security had not been taken;

the Minister may, by notice published in the *Gazette*, declare that section 8 of the Act applies to those goods.

..."

"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.

...

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

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

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

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

(c) a value equal to the price of like goods produced or manufactured in a country determined by the Minister and sold for home consumption in the ordinary course of trade in that country, being sales that are arms length transactions;

(d) a value equal to the price determined by the Minister to be representative of the price of like goods produced or manufactured in a country determined by the Minister and sold for export from that country to another country in the ordinary course of trade, being sales that are arms length transactions;

(e) a value equal to the sum of the following amounts ascertained in respect of like goods produced or manufactured in a country determined by the Minister and sold for home consumption in the ordinary course of trade in that country:

(i) such amount as the Minister determines to be the cost of

production or manufacture of the like goods in that country;

(ii) such amounts as the Minister determines are the delivery charges and other costs necessarily incurred in selling the like goods;

(iii) an amount calculated in accordance with such rate, if any, as the Minister determines is to be regarded as the rate of profit on the sale of the like goods;

(f) a value equal to the price payable for like goods produced or manufactured in Australia and sold for home consumption in the ordinary course of trade in Australia, being sales that are arms length transactions.

...

(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.

...

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

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

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

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

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

..."

The first ground of challenge is that the respondents should have calculated normal value in accordance with s.269TAC(2)(d), namely the price charged for goods exported from Italy by the first applicant ("Enimont") to a third country, the

United States of America. The allegation is stated in the application thus:-

> "8. In applying s.269TAC of the Customs Act, the Respondents erred in failing to consider whether the First Applicant's sales in Italy were relevant or suitable within the meaning of s.269TAC(2). The Respondents failed to take into account the fact that the First Applicant's sales in Italy were such a small proportion of its total sales, and that in any event the market was so fundamentally different from the Australian market in relation to the nature, number and size of the buyers, the end use of the product, and the degree of regulation, that sales in Italy should not have been used for the determination of normal value. Further, the Respondents' decisions were not based on logically probative evidence."

The report of the Anti-Dumping Authority and the reasons which have been stated by the Minister for his decision show that both respondents ascertained normal value pursuant to s.269TAC(1) and (8), thereby taking the price of the domestic sales and adjusting those prices for differences in freight, delivery charges, packing and credit terms. This resulted in the calculation of dumping margins on Enimont's part of between 34% to 54%. It was considered that the domestic sales were made in the ordinary course of trade and at arms length and provided an appropriate base.

The respondents had before them a report from Ms Fisher, an officer in the Australian Embassy in Brussels. The report stated that on 21 and 22 November 1990, Ms Fisher made inquiries concerning Enimont's domestic sales. Ms Fisher reported that the quantities sold to Australia were much greater than those sold

to individual retailers in Italy. However, she reported that the differences between the domestic sales and the sales to Australia were not "sufficiently compelling to eliminate the sales on the domestic market on the basis that they were not suitable or relevant." Ms Fisher recommended that the selling prices to the firm Logaglio be adopted as the shipment sizes to that firm were the closest to those sent to Australia. Ms Fisher reported that the prices of Enimont's sales to Australia were calculated by reference to the prices at which the goods were sold to customers in Australia, each price being negotiated inter alia on the quantity purchased by the particular customer. She reported that the volumes shipped to individual customers in Australia were generally a container load of 17.7 mt or two container loads, that is 35.4 mt, whereas the sales to customers in Italy tended to be in shipments of 15-20 mt. Ms Fisher thought the differences were not so great as to render the domestic prices unsuitable.

Enimont submitted to the Anti-Dumping Authority a number of reasons as to why domestic sales were not suitable. In the first place it was said that the domestic sales in Italy were too small a proportion of total sales for the Italian domestic market to be regarded as an appropriate basis for comparison. It was said that most of the users of sodium cyanide in Italy were small companies in the electroplating and pharmaceutical industries whereas the sales to Australia were sales to large users in the gold mining industry. Enimont said that, of the exporters examined by the respondents, it was only in the USA that sodium

cyanide was sold to the gold mining industry and that this explained why there was not found to be any significant dumping from the USA to Australia when the USA domestic prices were compared with the Australian prices. Enimont alleged that it had a monopoly or virtual monopoly in the Italian domestic market. Enimont submitted that the price of its sales into the USA, calculated in accordance with s.269TAC(2)(d) would provide a suitable basis for calculating the normal value of Enimont's sales.

To put the matter briefly, Enimont alleged that its sales in Italy were less than 10% of its total sales and were sales to persons in the electroplating and pharmaceutical industries in a market over which, for various reasons, Enimont had a virtual monopoly. Enimont alleged that the appropriate basis for a comparison of sales to Australia, which were double those to Italian consumers and were to the gold mining industry, were Enimont's sales to the USA, in which sodium cyanide was used by gold mining companies. The USA was said to be particularly suitable as that country was found not to dump to any significant extent into Australia. Enimont's allegation was that normal value could be ascertained from trade to the USA whereas the sales within Italy reflected an abnormal and high value.

When s.269TAC provides the means of calculating the normal value of goods exported to Australia, it is seeking to provide a practical and workable means of establishing a price which is a normal value. Ordinarily, s.269TAC(1) will apply so that the

comparison is between the price in the country of export and the price in Australia. See, eg., para. 1 Article 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Cooper, Customs & Excise Law p.534). However, normal value must, in an appropriate case, be determined otherwise, as by reference to the price at which goods in the country of export are sold to a third country, not the country of import. The adoption of such a comparison may be particularly appropriate and required when the transaction, the sale to the third country, appears to reflect normal value in world terms i.e. a normal competitive world price. The Agreement on Implementation so provides in paras. 3 and 4 of Article 2. Paragraph 4 uses the expression "a proper comparison" which conveys the concept.

Of course, the facts of each case differ and the application of s.269TAC will differ accordingly. It is worth noting that, in the present matter, neither the Anti-Dumping Authority nor the Minister considered the affairs of each country entirely separately. Indeed, the inquiry was an inquiry on possible dumping by many countries. And in the inquiry into injury to Australian industry, there appears to have been a consideration of the total effect of the dumping rather than a separate consideration of the individual effect of each country's sales. Indeed, the declarations by the Minister, as recommended by the Anti-Dumping Authority, referred to "the goods" as "sodium cyanide ... exported from Degussa A.G. of the Federal Republic of Germany, Enimont Anic SRL of Italy, Mitsui & Co Ltd of Japan,

Tong Suh Petrochemical Corp Ltd from the Republic of Korea and ICI Chemicals & Polymers Ltd of the United Kingdom" and to "the amount of the export price of the goods". Presumably, the declarations should be read distributively. However, there was no separate declaration for each country.

I would therefore agree with the submissions put on behalf of the applicants that, in this circumstance, if it were established that the sales in Italy did not reflect the normal value in world terms of sodium cyanide in the form and in the quantities in which it was sold to Australia, then another value which did so may have been more appropriate.

Section 269TAC(2) is not to be read in an unduly technical sense. It is one of a series of provisions that seeks to determine a normal value against which the price to Australia can be compared. Therefore the words in para. (2)(a)(i) "the absence of sales" should not be read as referring to a total absence of sales but to an absence of sufficient sales on which a comparison can be based. When para. (2)(a)(ii) refers to the situation where the sales in the domestic market are not suitable for use in determining such a price, it permits any reason that shows that they are not suitable for use in a comparison to be adopted. And finally, it must be kept in mind that "the normal value" is looking to just that, namely the normal value of the goods and therefore, if the price in the market of origin is for any reason out of line with the normal price in world terms, then the sales in that market may not be suitable for use. The word "cannot",

which appears at the end of sub-section 2(a) should not be given any emphasised meaning. If the sales in the country of origin are not suitable for establishing normal value, then the normal value cannot be ascertained by using them.

In relation to the submission that less than 10% of Enimont's total annual production was sold in Italy and that the sales to Australia were twice those of the Italian sales, reference was made to Beseler and Williams, Anti-Dumping and Anti-Subsidy Law: the European Communities, which states inter alia:-

> "4.2.3.4 Finally, the domestic price must be representative enough to permit a proper comparison to be made with the export price. This implies two conditions:
>
> (1) The transaction prices should reflect the general price situation in the country of origin so that special prices, due to such factors as end of season sales, may be disregarded when establishing the normal value.
>
> (2) In addition, the volume of transactions on the domestic market must be great enough to allow a valid comparison to be made with the exports. Thus, when sales in the country of origin are relatively small compared with those for export, account must be taken of the fact that the prices of such sales may be influenced by factors other than normal commercial considerations and that their quantities may be residual or so negligible that they cannot be considered as reliably reflecting pricing in the ordinary course of trade. It is because of this possibility that until 1984 Canadian legislation provided that the domestic price should only be considered to be representative if the domestic sales amount to at least 25 per cent. of all exports, excluding those to Canada. At one time the United States had a similar 25 per cent. rule but the threshold was later reduced to 5 per cent. Community legislation does not lay down any specific percentage and it was formerly the Commission's practice to determine on a case by case basis whether the volume of domestic sales is disproportionate to the volume of export sales. Thus, instances have arisen when the sales on the domestic market have been considered to be too low to permit a proper comparison to be made. More recently, the Commission has made it plain that it now considers it reasonable to apply a threshold

> and, given the commercial importance of the Community as an import market, has decided that this threshold should be at a level of 5 per cent. of exports to the community."

The general principle as stated by Beseler and Williams is clear enough. Sales in the country of origin are unsuitable unless they reflect a situation of normal value, a situation against which the export prices can be judged so that a proper comparison is made. However, there was material before the Anti-Dumping Authority that the domestic sales in Italy were suitable for this purpose. Whether or not the quantum of sales in Italy was sufficient for the purpose was a matter of fact for the judgment of the decision-makers of fact.

An affidavit from Mr P.H.J. Evans of the Anti-Dumping Authority, who assisted in preparing the report of the Anti-Dumping Authority, states inter alia:-

> "5. In preparing the report I considered the submission made by Enimont that it was a natural monopoly in Italy but considered that it was not a matter which would make sales in Italy by Enimont not suitable so that TAC(1) would not be appropriate."

Mr Evans appears to have rejected consideration of a monopoly in Italy as being irrelevant. However, if there was a monopoly situation in Italy, that could consistently with the Act be thought to be a reason why domestic sales in Italy were unsuitable for use. If the price in the country of origin is higher than normal value because of a monopoly situation, that would seem to be a reason why the use of sales in the country of origin would not be appropriate. Nevertheless, no ground of

challenge was directed specifically to the views held by Mr Evans. He was not the Anti-Dumping Authority but merely an officer who assisted in the work of the Authority. The views of the Authority were published in its written report.

The material before the Court disclosing what matters were taken into account by the respondents is so limited that I cannot conclude that it was not open to the respondents to proceed as they did. If the domestic prices of the various countries which the respondents considered had shown a general level of price and it could be seen that the Italian domestic price was substantially higher, then that would be an indication that the Italian domestic price was not suitable for the purposes of s.269TAC. Or if the prices considered by the respondents did, in fact, show a substantial difference between the price of sodium cyanide sold to the electroplating and pharmaceutical industries on the one hand and to the gold mining industry on the other, then that would also provide a reason for adopting a basis other than that provided by s.269TAC(1) and (8). But there is no material before the Court which shows that any such circumstance was disclosed by the material before the decision-makers. In the light of the report prepared by Ms Fisher, it has not been established that the respondents committed an error in law by adopting the Italian domestic price under s.269TAC(1) and adjusting it in accordance with s.269TAC(8). See Australian Broadcasting Tribunal v. Bond (1990) 170 C.L.R. 321 at 355-60.

An aspect of the matter which limits the consideration of this matter is that neither the copy of the report of the Anti-Dumping Authority which is in evidence nor the declarations of the Minister have disclosed what, for each of the countries found to have dumped, was the normal value determined by the decision-makers. Thus, it is not shown whether the normal values adopted by the decision-makers were consistent one with another or whether they or some of them were disparate and inconsistent with the general level. The confidential attachments to the report of the Anti-Dumping Authority which disclosed these matters are not before the Court. See s.269TG(3).

In the context that the exports from several countries were being considered, one would have expected the decision-makers to have had in mind consistent normal values, values consistent in the world context. But the copy of the report of the Anti-Dumping Authority which is in evidence does not disclose whether or not this was so. Thus, eg., although the report found that the dumping margins of Enimont ranged from 34% to 54% and that the dumping margins of the exporters from the USA were minimal, the copy of the report in evidence does not show whether Enimont sold into Australia at prices lower than the USA sales to Australia or, indeed, whether Enimont's sales to the USA, which I assume were greater than those within Italy, were made at prices consistent with the prices at which the USA exporters sold to Australia. In the absence of any information on such matters, I find it difficult to arrive at an informed view as to the challenged decisions. On the information before the Court,

I cannot hold that there was any error of law in the respondents' application of s.269TG(1) and (8).

It was submitted that the Minister did not consider the possible application of s.269TAC(2) and further that there was a breach of the rules of natural justice. However, I am satisfied that the Minister did consider the issue and that there was no breach of the rules of procedural fairness.

It is clear from the report of the Anti-Dumping Authority that the issue as to whether normal value should be assessed in accordance with s.269TAC(2) had been raised by some of the parties to the inquiry. It was specifically mentioned in the report that it had been suggested that the sales of sodium cyanide to the chemical and electroplating industries were not suitable. The Minister himself in his reasons did not specifically mention s.269TAC(2) but adverted to the point when he said:-

> "The Italian producer, Enimont, made domestic sales that were used to determine normal values under s269TAC(1). The normal values were adjusted under s269TAC(8) for differences in freight, delivery charges, packing and credit terms."
>
> "Sales by Enimont were in the ordinary course of trade and at arms length."

It follows that the Minister was satisfied that the sales in Italy were suitable for use.

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. See Kioa v. West (1985) 159 C.L.R. 550 at 585-588, 595, 612-16, 633.

It was submitted that there was a breach of procedural fairness in that the Anti-Dumping Authority excluded from its attention some of the matters to which it ought to have directed attention and approached the interpretation of sub-ss.269TAC(1) and (2) on an incorrect basis, thereby excluding the Minister from considering matters that ought properly to have been before

him. The Anti-Dumping Authority said in the course of its report:-

> "Except in the case of the USA, sodium cyanide is not sold in domestic markets of the countries under inquiry for use in gold extraction. In these countries sodium cyanide is mainly used in the chemicals industry and electroplating.
>
> Some parties suggested that such sales are not relevant for the purposes of subsection 269TAC(1) and that other approaches to assessing normal values should be used.
>
> The Authority notes that subsection 269TAC(1) does not include a test concerning differences in the domestic and export marketing of the product. Rather the tests focus on whether sales are in the ordinary course of trade and at arms length.
>
> Where the terms and circumstances of domestic and export sales differ and prices are affected, subsection 269TAC(8) requires adjustments to be made to account for these differences.
>
> Therefore, where the Authority is satisfied that domestic sales meet the tests imposed in subsection 269TAC(1), it has used this subsection together with adjustments under subsection 269TAC(8) to assess normal values."

As can be seen, the Anti-Dumping Authority did not discuss whether there was any aspect of the facts which pointed to the pharmaceutical and electroplating industries being unsuitable for use in the determination of normal value. The Anti-Dumping Authority took the view that s.269TAC(1) did not include a test concerning differences in the domestic and export markets of a product. In my opinion, any such difference could provide a reason as to why sales in the country of origin were not suitable for use in the determination of normal value. Thus, if it were shown that the prices to the pharmaceutical and electrical industries were different from the prices of the sodium cyanide sold to the gold mining industry, that could be a factor to be taken into account, for it could provide a reason

why the sales in the country of origin did not provide a guide to normal value.

However, although it seems to me that the reasoning in the report of the Anti-Dumping Authority was not correct, I could not draw from the report the conclusion that the Anti-Dumping Authority did not consider that the Italian sales were suitable for use or the conclusion that it was not open to the Anti-Dumping Authority on the material before it to conclude that they were. Nor would I draw the conclusion that there was any breach of natural justice in the decision of the Minister. In my opinion, the events which occurred were fair from a procedural point of view. The report of the Anti-Dumping Authority dealt with the issues of substance which were raised before it. An error in reasoning, if there were one, does not equate to a breach of procedural fairness.

Challenge was also made on the ground that the finding of the respondents on the issue of material injury was incorrect. It was submitted that the sales by Enimont to Australia, although substantial from Enimont's point of view, were only a very small part, less than 3%, of the overall sales of sodium cyanide in and to Australia. It was submitted that Enimont's sales were too small to influence the Australian price and that all that Enimont had done was to follow the price established in the market. It was submitted that Enimont had lost market share over the period by not selling at an aggressive price. It was submitted that the position of each exporter or each export country must be looked

at on its own and that it is not appropriate to aggregate all sales to Australia at dumped prices in order to determine whether there has been material injury to Australian industry.

However, I do not see that there was any error of law in the approach taken by the Anti-Dumping Authority and by the Minister. As I have earlier mentioned, the inquiry was an inquiry into dumping by many countries and the Minister's declaration referred to exports from several countries. In the circumstances, it would seem impracticable to do otherwise than to look at the effect overall of dumping on Australian industry. It is the sale to Australia of goods at dumped prices which causes the harm. The sales by Enimont may have amounted to less than 3% of the overall sales in Australia but it is not shown that they were insignificant. I agree with the remarks of Sheppard J. in Feltex Reidrubber Ltd v. Minister for Industry and Commerce (1983) 46 A.L.R. 171 at 186-7. See also ICI Australia Operations Pty Ltd v. Fraser & Ors (Black C.J., Neaves and von Doussa JJ., 20 March 1992, unreported).

Lastly, reliance was placed upon perceived differences between the two declarations and also between them and the Minister's reasons. Those reasons, which did not refer to the question of securities, said, inter alia:-

> "40. Whilst I conclude that the industry did not suffer material injury during 1990, I found that the presence of dumped imports of Sodium Cyanide from the countries under inquiry except the USA posed a threat of material injury. In determining for the purposes of s269TG whether there was a threat of material injury to local industry I had regard to the lifting of production restrictions which previously limited

> the ability of local industry to supply the local market; the large share of the market in 1990 held by dumped imports with significant dumping margins; the likelihood that local industry's market share could increase in the future; the significant dumping margins of imports from all sources except the USA; the likelihood of continued price suppression and depression and the likelihood that the Australian industry will record substantial losses.
>
> 41. I concluded on the basis of the above that I should impose anti-dumping duties against exports of sodium cyanide from Italy."

It will be seen that the declaration under s.269TG(1) used the expression "material injury ... would or might have been caused" while the declaration under s.269TG(2) used the expression "material injury ... is being caused". The reasons of the Minister said that the industry did not suffer material injury during 1990, the previous calendar year, but that the dumped imports "posed a threat of material injury".

However, the finding that material injury threatened was sufficient to support the declaration under s.269TG(1) that material injury "would or might have been caused", which was the ground of that declaration. The term used in the second declaration, "is being caused", was in my opinion a misdescription which did not invalidate that declaration. It was sufficient to support the declaration that material injury "has been or is being caused or is threatened". In the view of the Minister material injury was threatened. That was sufficient. Indeed, as s.269TG(2) looks to the position in the future, it was a most significant finding. The words used by the declaration misdescribed the Minister's view. But that did not, in my view, invalidate the declaration. This was not a case where a

decision-maker purported to exercise a power which was not available to him but could have available another power which he did not exercise. For the purposes of s.269TG(2), the power which the Minister exercised, it was sufficient that the Minister was satisfied that the dumping posed a threat of material injury. The misdescription in the declaration of the state of the Minister's satisfaction did not invalidate the declaration, for it was a mere misdescription, not a matter going to the essence of the declaration.

For these reasons, the grounds on which the application is brought fail. The application will be dismissed with costs.

I certify that this and the 22 preceding pages are a true copy of the reasons for judgment herein of the Honourable Mr Justice Davies.

Associate: 

Date: 9 April 1992

Counsel for the Applicants:	Mr J.D. Heydon QC & Mr C.P. Comans
Solicitors for the Applicants:	Sly and Weigall
Counsel for the Respondents:	Ms M. Beazley QC
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	17 and 18 December 1991
Date of Judgment:	9 April 1992