JUDGMENT No. 92 / 91

CATCHWORDS

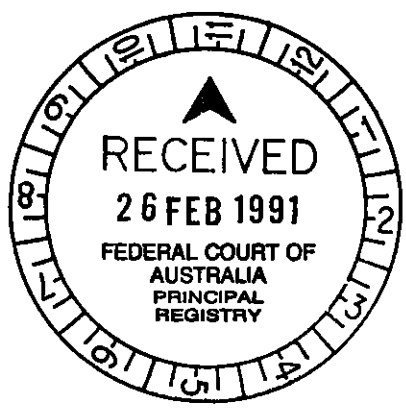
ADMINISTRATIVE LAW - Failure to consider relevant considerations - Report under s. 9 of the *Anti-Dumping Authority Act* 1988 - Imposition of duty under s. 8 of the *Customs Tariffi (Anti-Dumping) Act* 1975 - Meaning of "an Australian industry" in s. 269TG of the *Customs Act* 1901 - Material injury to a regional market within the Australian industry - Relevance of GATT Anti-Dumping Code in interpretation of the anti-dumping legislation - Korean exports of clinker to Western Australia.

Customs Act 1901: s. 269TAC, s. 269TAE, s. 269TG
Customs Tariff (Anti-Dumping) Act 1988: s. 8
Anti-Dumping Authority Act 1988: s. 9, s. 10
Administrative Decisions (Judicial Review) Act 1977
Acts Interpretation Act 1901: s. 23
GATT Anti-Dumping Code

SWAN PORTLAND CEMENT LIMITED & COCKBURN CEMENT LIMITED v THE MINISTER FOR SMALL BUSINESS AND CUSTOMS & THE ANTI-DUMPING AUTHORITY

G 377 of 1990

LOCKHART J.
SYDNEY
26 FEBRUARY 1991



IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G377 of 1990
)
GENERAL DIVISION)

BETWEEN: SWAN PORTLAND CEMENT LIMITED and COCKBURN CEMENT LIMITED

Applicants

AND: THE MINISTER FOR SMALL BUSINESS AND CUSTOMS

First Respondent

THE ANTI-DUMPING AUTHORITY

Second Respondent

JUDGE MAKING ORDER: LOCKHART J.

WHERE ORDER MADE: SYDNEY

DATE ORDER MADE: 26 FEBRUARY 1991

MINUTE OF ORDER

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicants pay the costs of the respondents.

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

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26 February 1991

REASONS FOR JUDGMENT

LOCKHART J.

The applicants, Swan Portland Cement Limited ("Swan") and Cockburn Cement Limited ("Cockburn"), manufacture cement clinker ("clinker") for their own use in the production of cement. They also manufacture cement. The clinker is produced in the main from local sources. The applicants are the sole manufacturers of clinker in Western Australia and they do not export any part of the clinker or cement they produce.

Until about April 1987 the applicants were the sole suppliers of cement in Western Australia. In about April 1987 Merman Pty. Limited ("Merman"), a Western Australian company trading as Atlas Cement, commenced to import supplies of clinker from the Republic of Korea ("Korea"). Merman has also since about April 1987 manufactured and sold cement in Western

Australia and has used the imported clinker from Korea for use in its cement manufacturing operations.

Clinker is a manufactured product of a pellet type made from calcium carbonate or limestone to which is added other materials. It is then fired in a kiln to a very high temperature and produces little round pellets called clinkers. Portland cement is made from clinkers by grinding them with gypsum.

On 24 December 1987 Swan and Cockburn lodged with the Australian Customs Service ("ACS") an application for the imposition of anti-dumping duties on imports of clinker supplied to Merman by the Korean exporter, Ssangyong Cement Industrial Company Limited of Korea ("the exporter"). A third party, ITC Australia, joined in the application. The three parties alleged that the exporter was supplying clinker at dumped prices and that the dumped imports of clinker from Korea were causing material injury to the Western Australian industry. In the application the three parties estimated Merman's level of imports of clinker to be approximately 66,000 tonnes per annum and stated that sales of cement in Western Australia were approximately 550,000 to 600,000 tonnes per annum.

ACS decided to hold an inquiry into the complaint. On 2 March 1988 ACS published a formal notice of the initiation of the inquiry. Subsequently ACS sought certain information from Merman. Merman responded by applying to this Court for orders

staying the inquiry, but the application failed: see *Merman Pty. Limited v Comptroller-General of Customs* (Lee J., 16 September 1988). In the meantime the inquiry proceeded and on 31 August 1988 ACS published its preliminary finding in which it concluded, inter alia, that:

1. there was sufficient evidence to indicate that the imports of clinker from Korea had been exported at dumped prices;

2. the margins of dumping were significant;

3. there was a regional impact (i.e. in Western Australia) of the dumped clinker from Korea of sufficient severity to constitute material injury to the Australian industry producing clinker; and

4. there was a threat of material injury to the Australian industry producing clinker from future imports of clinker at dumped prices from Korea.

The report recommended that, as an interim measure, "provisional anti-dumping measures should be imposed at a level sufficient to relieve the material injury caused by the imports of cement clinker at dumped prices from the Republic of Korea".

On 1 September 1988 the *Anti-Dumping Authority Act* 1988 ("the *Anti-Dumping Authority Act*") came into operation. That Act

established the Anti-Dumping Authority ("the Authority") which consists of a single member appointed by the Governor-General with the functions set out in s. 5 of that Act. Those functions include preparing and giving to the Minister reports under s. 9 of the Act. Section 9 provides:

> *"9(1) The Minister may, by notice in writing delivered to the Authority, request the Authority to consider, and prepare and give to the Minister a report on, an anti-dumping matter specified in the notice, and the Authority shall comply with the request as soon as practicable.*
>
> *(2) The Authority may, where it considers it appropriate to do so, consider, and prepare and give to the Minister a report on, any anti-dumping matter."*

Section 10 of the *Anti-Dumping Authority Act* provides that, without limiting the matters to which the Authority may have regard in performing its functions:

> *" ... the Authority shall, in performing its functions and exercising its powers, have regard to:*
>
> *(a) the Commonwealth Government's policy in relation to anti-dumping matters; and*
>
> *(b) Australia's obligation under the General Agreement on Tariffs and Trade;*
>
> *not to use the imposition of duties under the Anti-Dumping Act to assist import competing industries in Australia or to protect industries in Australia from the need to adjust to changing economic conditions."*

On 1 September 1988 the Minister for Small Business and Customs, pursuant to the Minister's powers under s. 9(1) of the *Anti-Dumping Authority Act*, requested the Authority to prepare a report as to whether duty should be imposed under s. 8 of the *Customs Tariff (Anti-Dumping) Act* 1975 (*"the Anti-Dumping Act"*) on clinker exported from Korea.

The Authority commenced its inquiry, received submissions from and conferred with representatives of interested parties including Swan and Cockburn.

The Authority issued its report No. 1 on 23 December 1988 ("Report 1") in which it found that:-

(a) clinker had been dumped from Korea in Australia, the export prices of the five shipments landed in Australia in 1987-88 having ranged from 58% to 83% of their normal value in Korea;

(b) the Australian industry producing "like goods" to the dumped imports was the industry producing clinker;

(c) the question whether goods had been dumped must be determined with reference to the Australian clinker industry "taken as a whole", and not only to the West Australian market;

(d) the imports had caused material injury to the Western Australian industry consisting of the applicants, but not to the Australian industry as a whole; but that the Australian industry taken as a whole had suffered some degree of injury; and

(e) it be recommended to the Minister that he accept an undertaking from the exporter that it would not in future export clinker to Australia at an export price less than $33.97 per tonne FOB or as may be determined from time to time pursuant to s. 4A of the *Anti-Dumping Act*.

On this basis the Authority recommended that the Minister suspend indefinitely his consideration of whether a declaration should be made under s. 8 of the *Anti-Dumping Act*.

On 5 January 1989 the Minister adopted the recommendations of the Authority. He accepted the undertaking from the exporter and no further action was taken on the complaints.

On 2 February 1989 a second proceeding was commenced in this Court (the first proceeding being the one heard by Lee J.) when the applicants filed an application to which the Minister and the Authority were respondents. The applicants sought a review under the *Administrative Decisions (Judicial Review) Act* 1977 ("*the Judicial Review Act*") of the decision of the Authority to make the recommendations set out in its report and the decision of the

Minister to accept those recommendations.

One of the grounds relied on by the applicants in the proceeding which was heard by Wilcox J. was that the method by which the Authority fixed the value of NIFOB was erroneous. NIFOB (meaning a non-injurious free on board price) is a price constructed by the Authority or by the ACS, as the case may be, which if charged by the exporter to the importer would put the importer on an equal footing with the Australian manufacturers. It is referred to as NIFOB because it is a price which is non-injurious to the Australian industry. His Honour regarded this as the critical decision made by the Authority. Wilcox J. found that the Authority had assessed the NIFOB wrongly and he commented that "the critical task (i.e. for the Authority in reconsidering the case) will be the rethinking of the NIFOB". His Honour held that in this respect the recommendations of the Authority and the decision of the Minister were "legally flawed", and he ordered that the Authority's minute of recommendation and the Minister's decision to adopt it be set aside and the matter referred back to the Authority for further consideration.

The Authority then considered further the question whether a dumping duty notice should be published in respect of the clinker.

The Authority reconsidered the matter and presented a further report to the Minister in report No. 21 of May 1990

("Report 21").

Report 21 comprises some 30 pages divided into the following chapters: 1 "Summary, General Comments and Recommendation"; 2 "Background"; 3 "Previous Inquiries into Clinker from Korea"; 4 "Federal Court Case"; 5 "Material Injury"; 6 "Non-Injurious Free-on-Board Price" and 7 "Conclusions".

The report contains many statements and findings which are material for the purposes of the present case, but it is not necessary to set them out in full. I shall, however, in the course of dealing with the submissions mention some of the contents of the report. It is helpful to set out chapter 1 "Summary, General Comments and Recommendations" in so far as it bears on the present case; the relevant parts extracted from that chapter are as follows:

> *"Specifically, the Court found that the Authority had assessed the NIFOB wrongly. The Court commented that 'the critical task [for the Authority, in reconsidering the case] will be the rethinking of the NIFOB'. The judgement makes it clear that the Court did not expect the Authority to have to revisit other major issues, such as the question of material injury to the domestic industry.*
>
> *The present report results from the Authority's further consideration of the matter.*
>
> *One effect of the Federal Court's decision was that the exporter was released from its undertaking. Following the court decision the Korean exporter advised the Authority that it was not prepared to offer a new*

undertaking until the Authority had established that the Australian cement industry, taken as a whole, had suffered material injury as a result of imports from Korea.

Because of the withdrawal of the offer of the undertaking the Authority has had to address the question of material injury. To simply rework the NIFOB, as the Federal Court suggested, when the Minister would be powerless to impose dumping duties (because material injury or the threat of material injury had not been established) or to accept an undertaking (which, for the same reason, would not be offered) would be merely academic. This point is explained more fully in Chapter 4.

The Authority, in conducting this inquiry, has initially examined the impact imports from Korea had on the Western Australian industry, before considering any impact on the Australian industry. The results are discussed at Chapter 5, 'Material Injury'.

From its examination of information provided by the industry, the Authority considers that the industry in Western Australia improved its position markedly in 1989. Sales increased by 4.3 per cent compared to 1988, and the industry moved from a high loss in 1988 to almost break-even in 1989. While both Cockburn's and Swan's production of clinker fell in 1989, the Authority notes that both firms converted 'swing' kilns from clinker to lime production during the year, owing to the increase in local demand for lime. As a result both firms' capacity to produce clinker fell in 1989 - and both imported clinker to meet the demand for the finished product, cement.

Imports of clinker from Korea dropped a little in volume between 1988 and 1989 - by about 2.5 per cent. More importantly they fell from 51 per cent of total imports into Australia in 1988 to 25 per cent in 1989.

The Authority has concluded that the Western Australian clinker industry is not now suffering material injury from the entry of dumped clinker from Korea.

The Authority also examined the impact of imports from Korea on the Australian industry. The Authority notes that the Australian cement industry has been experiencing buoyant conditions and that Australian production of cement in 1989 was a record. The Authority understands that several major suppliers had difficulty in keeping up with demand and that some firms had to ration supply to their customers. It is apparent that the Australian cement industry is doing well and the Authority is quite unable to conclude that the industry, as a whole, is suffering material injury from the dumped imports of clinker.

The Authority does not consider that there is a 'clearly foreseeable and imminent' threat of future material injury to the Australian industry from imports of cement clinker from Korea.

The Authority has spent considerable time and effort examining the impact of clinker imported from the Republic of Korea on the Australian cement industry. This examination has led the Authority to the clear conclusion that dumped exports of clinker from Korea have not caused and are not threatening to cause material injury to the Australian industry producing like goods. Given that conclusion, it would be quite improper for the Authority to recommend anti-dumping action to the Minister; and the Authority will make no such recommendation.

The Authority understands that substantial investment is being planned by a company or companies within the Australian cement industry, and that some players in the industry are concerned that investment of that sort may not be viable if clinker continues to be dumped on the Australian market (more details are at Confidential Attachment 9).

The Authority has borne these views in mind in assessing (as it must, in law) whether or not there is a 'clearly foreseen and imminent' threat of material injury. As noted above, it has concluded that no such threat exists. It now notes, however, that it will of course have no hesitation in

recommending anti-dumping action if, at some time in the future, the prerequisites for such action are satisfied: that is, if dumping can be demonstrated to be causing or threatening material injury to the Australian industry.

Partly in that context, and partly because the Federal Court considered that 'the critical task [before the Authority] will be rethinking of the NIFOB', Chapter 6 of this report discusses the principles by which the Authority would be guided should the calculation of a NIFOB for cement clinker become necessary. The Authority hopes that this discussion will assist producers, exporters and importers in their planning.

The Authority recommends that the Minister for Small Business and Customs take no action under section 269TG of the Customs Act 1901, formerly section 8 of the Customs Tariff (Anti-Dumping) Act 1975, on imports of cement clinker from the Republic of Korea."

Report 21 contains the conclusions of the Authority at page 29 in these terms:

"The ADA concludes that:

- *there have been exports of cement clinker to Australia from the Republic of Korea at dumped prices;*
- *the Western Australian industry is not currently suffering material injury arising from the entry of clinker from Korea at dumped prices;*
- *material injury has not been caused to the Australian industry producing cement clinker, taken as a whole, by reason of the entry of clinker from Korea at dumped prices;*
- *there is no foreseeable and imminent threat of material injury to the Australian industry producing cement*

clinker, taken as a whole."

There are certain attachments to Report 21 which were confidential. I need not refer to them.

The recommendation of the Authority that the Minister take no action on the importing of clinker from Korea was accepted by the Minister on about 13 June 1990.

On 11 July 1990 the applicants commenced the present proceeding by filing an application for review of the recommendation and decision of the Authority and the decision of the Minister to accept the recommendation.

The applicants seek: a declaration that they constitute an Australian industry within the meaning of s. 269TG of the *Customs Act* 1901 (*"the Customs Act"*); orders setting aside the recommendation by the Authority in report 21 and the decision of the Minister to accept the recommendation from the Authority; and certain consequential directions and orders.

I referred earlier to ss. 9 and 10 of the *Anti-Dumping Authority Act*. Other relevant statutory provisions commence with s. 269TG of the *Customs Act* which provides that subject to s. 269TN (which is not relevant for present purposes), 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) ...*
>
> *the Minister may, by notice published in the Gazette, declare that s. 8 of that Act [i.e. the Anti-Dumping Act] applies to those goods."*

Section 269TAC of the *Customs Act* makes provision for the "normal value" of goods and, amongst other things, defines that expression in the context of the "normal value" of goods exported to Australia as being

> *"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."*

Section 269TAE deals with "material injury" to an Australian industry. It stipulates criteria to which the Minister may have regard in determining for the purposes of s. 269TG whether material injury to an Australian industry has been or is being caused or is threatened or would or might have been caused, or whether the establishment of an Australian industry has been

materially hindered, by reason of any circumstances in relation to the exportation of goods to Australia from another country (the country of export).

Section 8(5) of the *Anti-Dumping Act* empowers the Minister, by notice in writing signed by him, to direct that the dumping duty in respect of goods:

> *"is an amount to be ascertained by reference to the value, or to the weight or other measure of quantity, of the goods less the amount, if any, by which that amount exceeds the dumping duty that would be payable in respect of the goods under sub-s. (4), and the notice has effect accordingly."*

Section 8(5A) provides in that in exercising his powers under sub-s. (5) in relation to dumping duty in respect of goods, the Minister shall have regard to the desirability of ensuring that the amount of dumping duty in respect of those goods is not greater than is necessary to prevent the injury or a recurrence of the injury, or to remove the hindrance, referred to in paragraph 269TG(1)(b) or (2)(b) of the Customs Act, as the case requires.

The applicants attack the findings of the Authority made in Report 21 of May 1990 and the Minister's subsequent decision on a number of grounds. The primary submission of counsel for the applicants, and one which underlies the attack of the applicants on specific findings of the Authority in Report 21, relates to

the meaning of "an Australian industry" in the context of s. 269TG(1)(b)(i) of the *Customs Act*. Neither the *Customs Act* nor the *Anti-Dumping Act* contain any definition of the expression "Australian industry". The Minister must make a positive finding that, because of the dumping action, "material injury to an Australian industry producing like goods has been or is being or is threatened ...", as a necessary prerequisite to his being empowered to declare, by notice published in the Gazette, that s. 8 of the *Anti-Dumping Act* applies to the relevant goods.

Counsel for the applicants submitted that, although "an Australian industry" generally will be defined with reference to the industry as a whole in Australia, there may be circumstances where an isolated section of the Australian industry can be treated as "an Australian industry" for the purposes of s. 269TG.

It was argued that on the facts of this case, because the Western Australian clinker market is essentially a discrete market due to its distance from the rest of Australia and the substantial transport costs involved, it is to be regarded as the Australian industry for relevant purposes.

Reliance was placed by counsel for the applicants upon Article 4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the "GATT Anti-Dumping Code"), which provides so far as relevant as follows:

" *ARTICLE 4*
Definition of Industry

1. In determining injury the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that

(i) ...;

(ii) in exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market."

It was argued that the GATT Anti-Dumping Code applied to assist in the interpretation of Australia's anti-dumping legislation because the expression "Australian industry" is ambiguous and Article 4 may be resorted to for the purpose of

resolving the ambiguity.

Counsel for the applicants argued further that it was necessary to interpret "an Australian industry" in the way they suggested, for otherwise the purpose of the legislation, being to ensure that industries in Australia are not damaged by competition from foreign exports at prices lower than those realised in their domestic market, would not be fulfilled. The language involves a degree of flexibility and that flexibility, the applicants argued, was employed in order to enable identification of the relevant industry as one which is confined to the market in which the industry operates. This point was expanded by the applicants' use of a "pricing argument". In summary it went as follows:

(a) prices for goods in one market may be different from prices for the same goods in another market;

(b) the anti-dumping legislation necessitates reference to prices in the market in which the "Australian industry" in question operates (see s. 269TAE(1)(e), (2)(e) of the *Customs Act* and s. 8(5A) of the *Anti-Dumping Act*);

(c) the determination of dumping involves comparison of the normal value and the export price of the putatively dumped goods to yield a precise dumping margin;

(d) a precise calculation is also involved in calculating the amount of dumping duty in order to comply with s. 8(5A) of the *Anti-Dumping Act*;

(e) the process will work in the context of a more or less

discrete market when it is sensible to posit a domestic price and a level of export price; however, it becomes unworkable if the respondent's contention as to the meaning of "an Australian industry" is accepted; for, in that case, how can "the price" for the purpose of s. 269TAE(1)(e) of the *Customs Act* and s. 8(5A) of the *Anti-Dumping Act* be determined; and

(f) therefore the definition of "industry" must be congruent with the area (both economic and geographic) within which it is sensible to speak of a price, i.e. a market.

Relying on those arguments, the applicants submitted that Western Australia is to be regarded for the purposes of the clinker industry as a separate market and separate industry.

Counsel for the applicants did acknowledge that the judgment of Wilcox J. in the second round of this curial battle stood squarely in the path of the acceptance of his argument, but he submitted that his Honour was in error with respect to the interpretation of the expression "an Australian industry" and that I should not follow his Honour.

Wilcox J. found that the words "Australian industry" (see s. 269TG(1)(b) and 269TAE(1)) referred to the industry in particular goods in Australia as a whole; but his Honour said that this did not require that material injury be caused or threatened to each individual participant in the industry. He said that the expression is not limited to industries which

operate throughout the whole of Australia. His Honour said:

> *"The industry must be considered as a whole; a material injury to a part may constitute a material injury to the whole. Were it otherwise, a predatory dumper might, with impunity, 'pick off' one local manufacturer at a time. "*

His Honour rejected the argument of the applicants that an industry is "an Australian industry" within the meaning of the legislation if it is identifiable as a discrete industry which operates within Australia.

In my opinion, the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria. The difficulty seems to me to lie, not in defining the expression, but in determining on the facts of a given case whether a particular industry answers the statutory description of an Australian industry. The latter is not a question of construction; it is a question of identification by the relevant fact finding body, in this case, the Authority.

The determination whether material injury to an Australian industry producing like goods has been, or is being caused, or is threatened, is not an exercise of counting heads of markets, production or distribution centres or things of this kind. It

is essentially a practical exercise designed to achieve the objective of determining whether, when viewed as a whole, the relevant Australian industry is suffering material injury from the dumping of goods.

The present case raises the difficulties nicely. There is no dispute about the relevant market being the market in Western Australian for clinker. To say that the clinker industry must be regarded throughout Australia as a whole does not mean that the threat caused by dumping only in Western Australia and which may injure only the players in the market in Western Australia, cannot constitute material injury to the Australian clinker industry as a whole. Plainly it may where, for example, the continuance of the dumping may annihilate the West Australian industry. I find no difficulty with the proposition that an injury of this kind may constitute material injury to the Australian market as a whole. It depends on the facts of the case and inevitably it is a question of degree that involves balancing all relevant considerations and integers before concluding whether or not the dumping constitutes material injury to the Australian industry. For these reasons I reject the applicants' argument that it was necessary to interpret "an Australian industry" as they contended to achieve the purpose of the legislation of ensuring that industries in Australia are not damaged by competition from foreign exports at dumped prices.

I have considered the "pricing argument" put forward by the

applicants and reject it for three reasons. First, the term "industry" on its plain meaning does not have any geographical connotations and it certainly does not equate with the term "market". The term "industry" is defined in "The Shorter Oxford English Dictionary" as (relevantly) "a particular branch of productive labour, a trade or manufacture". "The Australian Commercial Dictionary", 5th Edition, defines "industry" as consisting of "a group of firms producing closely related and therefore competitive products". "A Dictionary of Economics", 4th Edition, Barnes & Noble, Inc. NY defines "industry" as being "a productive enterprise, especially manufacturing or certain service enterprises such as transportation and communications, which employs relatively large amounts of capital and labour. It is also used to identify a special segment of productive enterprise such, for example, as the steel industry". The "Dictionary of Business and Economics", The Free Press, defines it as a "specific branch of mining, manufacturing, or processing, in which a number of firms produce the same kind of commodity or service, or are engaged in the same kind of operation".

While the above definitions are by no means identical, in no definition is there a reference to geographical or market considerations. An industry, using its plain meaning, is defined only by the product involved. The description "Australian", when added to "industry"provides the only geographical reference in s. 269TG of the *Customs Act*.

Secondly, while it is true that the concept of "price" is important to the anti-dumping legislation, it is not accurate to say that, if you construe "Australian industry" as I have, then a price for the entire Australian industry must be found. I agree that it would be false to use a constructed average price. What must be considered is not a price but the prices of the goods in the markets that are within the Australian industry. Section 269TAE of the *Customs Act* states that the Minister may have regard to certain matters. Section 269TAE(1)(e) links price and Australian industry in the following terms:

> *"(e) the difference between:*
>
> *(i) the price that has been or is likely to be paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and*
>
> *(ii) the price that has been or is likely to be paid for goods of that kind exported to Australia from the country of export and sold in Australia."*

"Price" is an economic concept that is referable to a market, not an industry. The market forces of supply and demand set a "price" for goods. Therefore to find the price it is necessary to look at the market or markets that comprise the "Australian industry". As a result the Minister may have to consider different prices for s. 269TAE(1)(e)(i) and different answers to the "differences between" (i) and (ii) of s. 269TAE(1)(e). This is not inconsistent with the *Customs Act*. Section 23 of the *Acts*

Interpretation Act 1901 makes it clear that, unless the contrary intention appears, words in the singular number include the plural. The "price" in s. 269TAE(1)(e) can easily be read (and often will be read) as "prices". Of course this may lead the Minister to determine that one market within the industry is being injured while others are not being injured, due to different pricing structures. The present case is an example of that difference of injury but as I have said, such a situation may still lead, in certain cases, to a determination by the Minister that the Australian industry is being materially injured.

Thirdly, once it is accepted that there may be different levels of injury determined under s. 269TAE(1)(e) then it is logical that different levels of dumping duty may have to be imposed on a foreign exporter depending on the market in which the goods are dumped. Section 8 of the *Anti-Dumping Act* allows dumping duty to be imposed pursuant to a s. 269TG of the *Customs Act* declaration equal to the amount by which the amount of the export price of the goods is less than the amount of the normal value of the goods. The level of dumping duty may be varied in accordance with s. 8(5) but s.s 8(5A) must be taken into account when this is done. There is no reason in s. 8 why the Minister has to impose one level of dumping duty. The Minister has the power to impose different levels of dumping duty in particular cases depending on the injury or injuries involved.

The GATT Anti-Dumping Code is not part of Australian municipal law. That does not mean that it cannot be considered by Australian courts. Section 10 of the *Anti-Dumping Authority Act*, as I have noted, requires the Authority, in performing its functions and exercising its powers, to have regard to Australia's obligations under the General Agreement on Tariff and Trade ("GATT") not to use the imposition of duties under the *Anti-Dumping Act* to assist import competing industries in Australia or to protect industries in Australia from the need to adjust to changing economic conditions. Therefore in the given context GATT is directly relevant to the operation of Australia's anti-dumping legislation. However, s. 10 of the *Anti-Dumping Authority Act* does not instruct or authorise the Authority to have regard to all of Australia's obligations under GATT. The section instructs the Authority to have regard only to a particular obligation. See *Atlas Air Australia Pty Limited v The Anti-Dumping Authority*, unreported, Federal Court NG401 of 1990, Wilcox J., 15 October 1990. The obligation referred to in s. 10 bears no relevance to the question of the meaning of "an Australian industry".

There is an established doctrine that an international agreement to which Australia is a signatory may be resorted to for the resolution of ambiguity in the interpretation of relevant Australian legislation: see *D & R Henderson (Mfg) Pty Ltd v Collector of Customs for the State of New South Wales* (1974) 48 ALJR 132 per Mason J. at 135; *Atlas Air Australia Pty Limited v*

The Anti-Dumping Authority (supra).

In my opinion, the term "Australian industry" in the context of "material injury to an Australian industry producing like goods" within the meaning of s. 269TG of the *Customs Act*, other provisions of that Act and the *Anti-Dumping Act*, is not ambiguous. It may not be easy in a particular case to identify a particular Australian industry, but that is not a problem of interpretation so much as applying facts to an ordinary English expression. The interpretation of the term "Australian industry" is clear and unambiguous. It bears the meaning which I have mentioned earlier.

In Report 1 the Authority took the view that it was required to consider whether material injury had been caused to the Australian clinker industry taken as a whole. It said that, although there was no question that the industry as so defined suffered some degree of injury because one part of it (Western Australia), amounting to perhaps ten per cent of the whole, had been injured, there was a real question as to whether the injury to the whole industry had been "material". The Authority pointed to the fact that the dumped goods had accounted for less than two per cent of the Australian market and that the loss of profits, while material to the Western Australian companies, amounted to only about 4 per cent of the profits of the whole Australian industry. The Authority said it would be reluctant to conclude that the imports had caused material injury to the Australian

industry as a whole and mentioned as one reason for this conclusion that, unless quite unusual circumstances existed, the Authority would not accept that there had been material injury where the domestic industry had the vast majority, and the dumped imports only two per cent, of the Australian market and where industry profits had dropped by only four per cent.

The Authority in Report 1 also pointed to the unusual features of the present case, namely, that there was practically no trade between Western Australia and other States and that all the dumped imports had come into Western Australia only. It stated that these features led to a peculiar danger. It said that "on the bald figures" there had not been material injury to the Australian industry taken as a whole, but that the dumped imports into the West could continue, and perhaps increase, to the point where the Western Australian industry could suffer very severe damage, still without material injury to the Australian industry as a whole. It said:

> *"A predatory exporter ... could then turn his attention to another of the essentially discrete markets within Australia. ... Such a scenario could lead the Authority to assess the 'injury' to the Australian industry as a whole as more severe than the bald figures would suggest."*

The Authority went on to say that this "scenario" appeared unlikely for various reasons and then considered a number of matters which it perceived as relevant. Finally the Authority

recommended to the Minister that the undertaking as to price offered by the exporter be accepted and that the Minister's consideration of whether or not a declaration should be made under s. 8 of the *Anti-Dumping Act* be suspended indefinitely.

When the Authority made its Report 21 of May 1990, following the judgment of Wilcox J., it proceeded to consider whether or not material injury existed to the Australian clinker industry. The Authority naturally took as its starting point where it had left off with the prior report and brought it up to date by considering the intervening events and their impact upon the period as a whole, viewed from the time the alleged dumping had commenced to occur. The Authority again took the view, reinforced by substantially the same approach taken by Wilcox J., that the relevant industry was the Australian clinker industry viewed as a whole. The Authority concluded that the dumped exports of clinker from Korea had not caused and were not threatening to cause material injury to the Australian industry producing like goods.

The Authority also concluded that the West Australian clinker industry, even if viewed separately from the rest of Australia, "is not now" suffering material injury from the entry of dumped clinker from Korea and it supported that conclusion with findings of fact.

I reject the arguments of the applicants that the Authority

wrongly regarded the relevant Australian industry as the Australian industry as a whole rather than an Australian industry constituted by manufacturers of clinker in Western Australia. For the reasons I have already given, in my view the Authority used the correct interpretation of the expression "Australian industry" in this country's anti-dumping legislation. I propose to follow the judgment of Wilcox J. It is the judgment of another single Judge of this Court and it should be followed unless I am convinced that the earlier judgment is plainly untenable. I in fact agree in substance with the judgment of Wilcox J. on this matter. See *Leary v Federal Commissioner of Taxation* 80 ATC 4012; *Marbutt Gunnerson Industries Pty. Limited v Federal Commissioner of Taxation* 81 ATC 4464 at 4468; *Zibillari v The Queen* (1980) 31 ALR 693 at 695, 703 and 704; *Re Athanassopoulos* (1982) 61 FLR 294.

Another reason for dismissing the arguments of the applicants is that the Authority concluded, in the alternative, that even if the Western Australian clinker industry is viewed separately from the remainder of Australia, it was not at the time of Report 21 suffering material injury from the entry of dumped clinker from Korea. This is a finding of fact which has not in my view been shown to be in error.

I turn to the more specific complaints of the applicants against the findings of the Authority in Report 21; but these complaints are subsidiary to the principal question which raises

the construction of the phrase "an Australian industry".

Counsel for the applicants submitted that, in carrying out its reconsideration of the anti-dumping questions following the orders of Wilcox J., the Authority erroneously considered the question of material injury to the Australian clinker industry by referring to and considering information, documentation and data only from the period of time commencing after the Australian industry had suffered material injury, rather than reconsidering the whole question of material injury by reference to and consideration of material also from the period of time commencing just prior to the commencement of the material injury alleged to be suffered by the Australian industry.

This question involves a close examination of both Report 1, before the judgment of Wilcox J., and Report 21 which followed it. I have carefully examined the two reports and I cannot find support for this contention. It is true that the Authority when commencing its second investigation, which culminated in Report 21, in one sense took the earlier report as its starting point, but it is plain that the Authority did not divide its consideration into the earlier and the later periods and regard the later period as the only relevant period without reference to the period preceding the first report. It seems plain to me that the Authority considered the whole period of time commencing before the alleged dumping occurred and concluding with its Report 21 of May this year.

Indeed, the Authority referred to the fact that Wilcox J.'s judgment made it clear that the Court did not expect the Authority to "revisit other major issues, such as the question of material injury to the domestic industry". But the Authority said that one effect of the Federal Court's decision was that the exporter was released from its undertaking and the exporter was not prepared to offer a new undertaking until the Authority had established that the Australian cement industry, taken as a whole, had suffered material injury as a result of imports from Korea. The Authority then went on to say, correctly in my view, that to simply rework the NIFOB would be merely academic. The Authority then proceeded to examine afresh the impact of the imports from Korea on the West Australian industry and considered any impact on the Australian industry as a whole, and considered in both cases whether there had been "material injury". This ground of attack is not made out.

The applicants next asserted that, in assessing the effect of dumping on the volume of production or sales by the applicants during the 1989 year, the Authority failed to consider whether the reason for alteration in the volume of production or sales was material injury caused by the dumped imports of clinker or the conduct of the applicants themselves for the purpose of alleviating or mitigating the alleged material injury to them.

The particular finding of the Authority which is relied on in support of this submission is the finding of the Authority in

its Report 21 that it considered the industry in Western Australia improved its position "markedly" in 1989. The Authority said:

> *"Sales [that is in the cement industry] increased by 4.3 per cent compared to 1988, and the industry moved from a high loss in 1988 to almost break-even in 1989. While both Cockburn's and Swan's production of clinker fell in 1989, the Authority notes that both firms converted 'swing' kilns from clinker to lime production during the year, owing to the increase in local demand for lime. As a result both firms' capacity to produce clinker fell in 1989 - and both imported clinker to meet the demand for the finished product, cement.*
>
> *Imports of clinker from Korea dropped a little in volume between 1988 and 1989 - by about 2.5 per cent. More importantly they fell from 51 per cent of total imports into Australia in 1988 to 25 per cent in 1989."* (see p. 2)

The Authority dealt with the matters pertaining to this submission specifically in Chapter 5 "Material Injury". I see no point in setting out the many detailed considerations and findings made there by the Authority. They speak for themselves. I can see no support for the argument of the applicants. The Authority appears to me to have given close and careful consideration to the reasons for the alteration in volume of production or sales of cement and to the relevance of the production of clinker by the Western Australian manufacturers, also considering the importation of clinker from Japan by both Cockburn and Swan in 1989 to supplement their local production. I reject this submission.

Next it was contended on behalf of the applicants that the Authority failed to consider whether or not prices charged by the applicants in 1989 were less than those charged in the period before the dumping of clinker; and also failed to consider whether or not the prices charged by the applicant in 1989 were affected by partial alleviation or mitigation of the alleged material injury suffered by them after the dumping of clinker commenced.

Again there is no substance in this submission. The prices charged by the applicants in 1989 and the reasons for them were closely considered by the Authority in Report 21 and its conclusions were reached after due consideration of all the material. I reject the submission.

It was then submitted on behalf of the applicants that the Authority failed to consider the losses made by the applicants in 1987 and failed to consider whether the profit results of the applicants in 1989 were or were not a result of continuing injury to the applicants resulting from dumped imports of clinker.

The Authority did consider the earlier losses made by the applicants and the profits made later. Further, the Authority did examine the reasons for the losses in the earlier year and for the profits of the 1989 year and these are spelt out in the report itself. There is no substance in this contention.

The final submission was that the Authority failed to assess the normal value of the clinker exported from Korea in compliance with the orders of Wilcox J. Again there is no substance in this contention because, as mentioned earlier, the Authority took the view, in my opinion correctly, that it had to examine initially the impact of imports from Korea on the Western Australian industry before considering any impact on the Australian industry as a whole. It took the view (page 2 of Report 21) that "to simply rework the NIFOB" when the Minister would be powerless to impose dumping duties or to accept an undertaking would be merely academic and this point was explained in detail by the Authority in Chapter 4 "Federal Court Case". I reject this submission.

Much of the criticism of the findings of the Authority is that the applicants would prefer the material to have been assessed differently from the way in which it was assessed by the Authority. This is the very activity in which the Court cannot engage when reviewing administrative decisions under the *Judicial Review Act*. The Court is limited to the grounds set out in the *Judicial Review Act* and involves the Court in the role, not of an initial fact finder, but of ensuring that errors of law have not been committed by the fact finding body and that natural justice has not been denied the applicant for review. This is a case where the Authority has given, so far as I can see, close and careful consideration to the complex facts surrounding the clinker and cement industries in Australia, in particular Western Australia, and has not been shown to have erred.

For these reasons the challenge to the Authority's decisions and the consequential decisions of the Minister fail. The application is dismissed with costs.

I certify that this and the preceding thirty-three (33) pages are a true copy of the reasons for judgment herein of the Honourable Mr. Justice Lockhart.

Associate 

Dated: 26 February 1991

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Solicitors for the Applicants	:	C.G. Gillis & Co.
Counsel for the First & Second Respondents	:	C.J. Stevens
Solicitors for the First & Second Respondents	:	Australian Government Solicitor
Date of Hearing	:	30, 31 October 1990
Date of Judgment	:	26 February 1991