JUDGMENT No. 655 / 94

CATCHWORDS

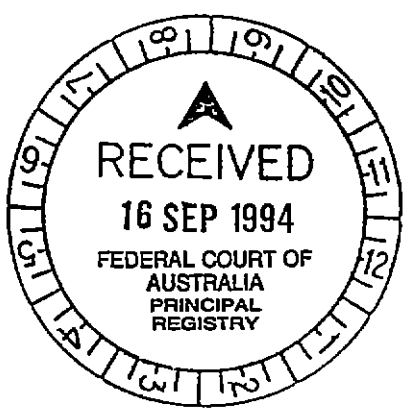
CUSTOMS - anti-dumping - clear float glass from China - determination of normal value - decision that current market price in Australia not suitable - use of costs based measure in surrogate country - whether course open to decision-maker

Customs Act 1901 (Cth) ss.269TAC (1), (2), (4) and (6)

Enichem Anic Srl v Anti-Dumping Authority (1992) 39 FCR 458

Pilkington (Australia) Limited v The Comptroller-General of Customs and The Minister of State for Science and Small Business
No. NG 715 of 1993

Judge: Heerey J
Date: 14 September 1994
Place: Adelaide (heard in Sydney)



IN THE FEDERAL COURT OF AUSTRALIA)
)
VICTORIA DISTRICT REGISTRY) No. NG 715 of 1993
)
GENERAL DIVISION)

B E T W E E N:

PILKINGTON (AUSTRALIA) LIMITED

Applicant

- and -

THE COMPTROLLER-GENERAL OF CUSTOMS

First Respondent

- and -

THE MINISTER OF STATE FOR SCIENCE AND SMALL BUSINESS

Second Respondent

JUDGE: Heerey J

DATE: 14 September 1994

PLACE: Adelaide (heard in Sydney)

MINUTE OF ORDERS

The Court orders:

1. That the first respondent's decision set forth in his report dated 16 March 1993 and undated supplementary report published on or about 29 July 1993 and the second respondent's decision made on or about 29 July 1993 to adopt and implement the said decisions be set aside.
2. That the first respondent reconsider according to law within 60 days of the date of this order his review of normal values for clear float glass exported to Australia from the Republic of Indonesia and from the Peoples Republic of China at dumped prices for the purpose of making recommendations to the second respondent within the said 60 day period as to the matter prescribed by

s.269TAD of the *Customs Act* (1901).

3. Order that the second respondent's decision made on or about 29 July 1993 be set aside with effect from the date of the second respondent signing legal instruments implementing the first respondent's recommendations made pursuant to order 2 hereof.

4. Order that the respondents pay the applicant's costs of the application including reserved costs.

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

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Applicant

- and -

THE COMPTROLLER-GENERAL OF CUSTOMS
First Respondent

- and -

THE MINISTER OF STATE FOR SCIENCE AND SMALL BUSINESS
Second Respondent

JUDGE: Heerey J

DATE: 14 September 1994

PLACE: Adelaide (heard in Sydney)

REASONS FOR JUDGMENT

The applicant challenges the determination by the Australian Customs Services (ACS) of the normal values for 5mm glass exported to Australia from the Peoples Republic of China.

In its supplementary report on review of normal values dated 29 July 1993 ACS proceeded as follows. It found that normal values for China could not be determined under s.269TAC (1) or (2) of the *Customs Act* (1901 (Cth) (the Act) because, in terms of s.269TAC (4)(a) and (b), the Chinese Government had a substantial monopoly of the trade of China and determined or substantially determined the domestic price of glass in that country.

Indonesia was adopted as the "surrogate country", but it was

found that s.269TAC (4)(c) could not apply because sales in Indonesia were not at arms length. It was not possible to obtain sufficient information in relation to export sales to third countries from Indonesia; therefore s.269TAC (4)(d) could not be applied. Section 269TAC (4)(e) could be used to determine normal values for all thicknesses except 5mm. In the case of 5mm glass, the ACS found that normal values could not be determined under that paragraph because Indonesian domestic sales of that thickness were not in the ordinary course of trade in Indonesia. This was because the glass had been sold at a loss for a period in excess of 18 months.

Critically for the purpose of the present case, ACS determined that s.269TAC (4)(f) was not considered appropriate

> "... on the basis that the current Australian selling price would be a price influenced to some degree by the effects of dumped imports. Given the sensitivity of the Australian glass market to price, it is reasonable to expect that the current market price is not suitable for purposes of determining normal values under s.269TAC (4)(f)."

The ACS therefore determined normal value for 5mm glass from China under s.269TAC (6) using costs of production, delivery and other costs necessarily incurred in selling the goods in Indonesia, profit and other "relevant information". The applicant argues that it was not open to ACS to apply s.269TAC (6).

In my opinion, that argument is correct. Section 269TAC involves a "hierarchy" of measures of normal value: *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 468.

When s.269TAC (4) is reached because the ACS is satisfied that the preceding sub-sections of s.269TAC are not appropriate, the normal value is to be 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". The ordinary meaning of the expression "whichever of the following paragraphs" in that context is that the Minister is to select from amongst paragraphs (c), (d), (e) and (f) the one that is considered to be appropriate and reasonable in the circumstances.

The only mandate for going outside those four paragraphs is to be found in the opening words of sub-s.(4) which makes the section subject to sub-ss.6 and 8. Sub-section 8 is not relevant for present purposes. Sub-section 6 provides

> "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 sub-sections, the normal value of those goods is such amount as is determined by the Minister having regard to all relevant information."

The only gateway to sub-s.6 is a finding that sufficient information has not been furnished or is not available to enable the use of the preceding sub-sections, which include sub-s.(4).

No such finding was made. Therefore, in my opinion, sub-s.(6) was not available to prevent the operation of sub-s.(4) which, as I have said, required the selection of one of the methods of determination therein stated.

There will be orders in terms of the application and an order that the respondents pay the applicant's costs, including reserved costs.

1. That the first respondent's decision set forth in his report dated 16 March 1993 and undated supplementary report published on or about 29 July 1993 and the second respondent's decision made on or about 29 July 1993 to adopt and implement the said decisions be set aside.
2. That the first respondent reconsider according to law within 60 days of the date of this order his review of normal values for clear float glass exported to Australia from the Republic of Indonesia and from the Peoples Republic of China at dumped prices for the purpose of making recommendations to the second respondent within the said 60 day period as to the matter prescribed by s.269TAD of the *Customs Act* (1901).
3. Order that the second respondent's decision made on or about 29 July 1993 be set aside with effect from the date of the second respondent signing legal instruments implementing the first respondent's recommendations made pursuant to order 2 hereof.
4. Order that the respondents pay the applicant's costs of the application including reserved costs.

I certify that this and the preceding four (4) pages are a true copy of the reasons for judgment of his Honour Mr Justice Heerey.

Dated: 14 September 1994

David Brennan
Associate

Appearances

Counsel for the applicant:	Mr B Walker SC and Mr M Speakman
Solicitor for the applicant:	C G Gillis & Co
Counsel for the respondent:	Mr A Robertson and Ms N E Abadee
Solicitor for the respondent:	Australian Government Solicitor
Date of hearing:	30 June 1994